TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 106 137.

F. WINDSOR ROBINSON, AS RECEIVER OF THE CONCERNS OF THE STATE NATIONAL BANK OF VERNON, TEXAS, PLAINTIFF IN ERROR,

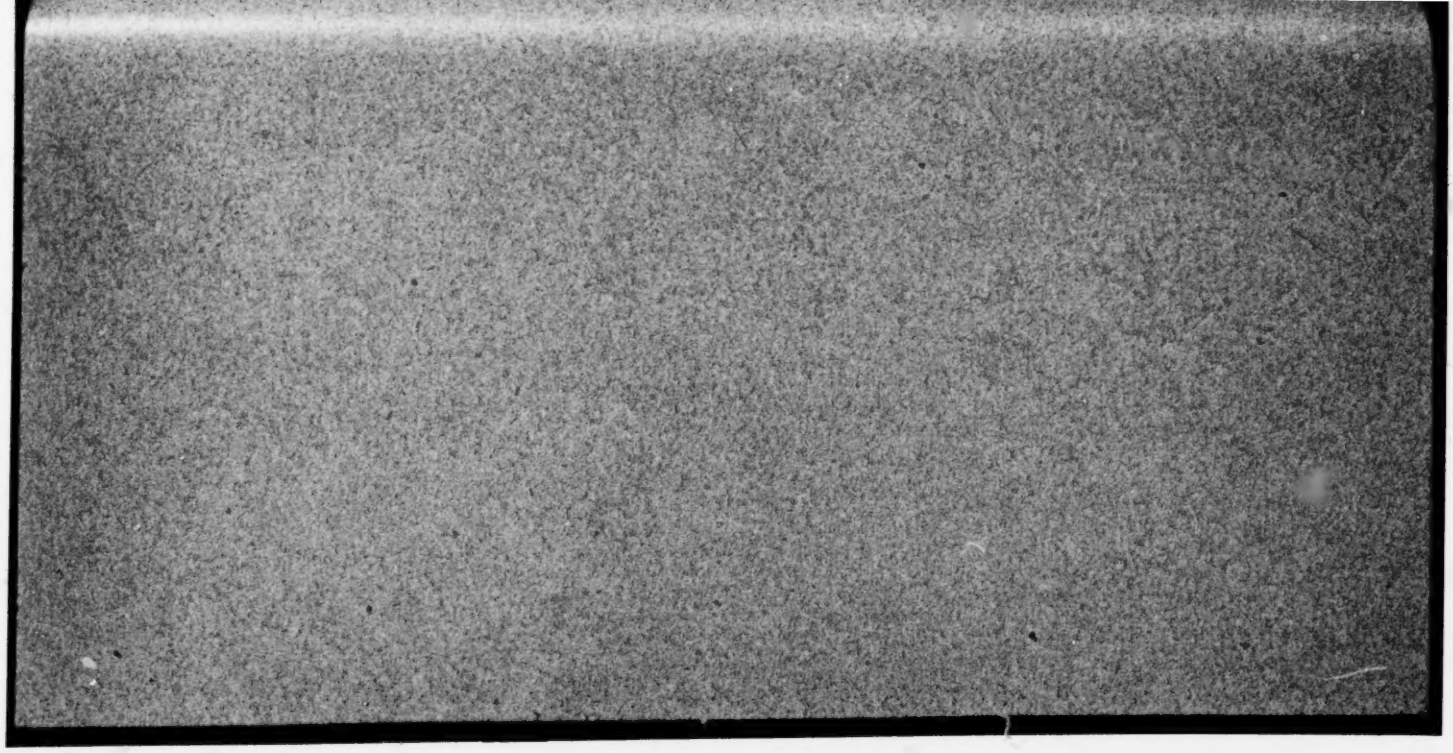
vs.

THE SOUTHERN NATIONAL BANK OF NEW YORK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED SEPTEMBER 28, 1899.

(17,520.)



(17,520.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 406.

F. WINDSOR ROBINSON, AS RECEIVER OF THE CONCERNS OF THE STATE NATIONAL BANK OF VERNON, TEXAS, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN NATIONAL BANK OF NEW YORK.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA, Second Judicial Circuit, } ss.:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Southern District of New York, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between F. Windsor Robinson, as Receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff, and the Southern National Bank of New York, defendant, a manifest error hath happened to the great damage of the said F. Windsor Robinson, as Receiver, etc., plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Second Circuit, together with this writ, so that you have the same in New York City, in said Circuit Court, on the 27th day of February next, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done

therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 31st day of January, 1899, and in the one hundred and twenty-second year of the Independence of the United States of America.

JOHN A. SHIELDS,
Clerk.

The foregoing writ is hereby allowed, and the same being taken by order of the Comptroller of the Currency of the United States, it is ordered that said appeal shall operate as a supersedeas without bond.

Dated, N. Y., 31st January, 1899.

E. HENRY LACOMBE,
U. S. Circuit Judge.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON

against

THE SOUTHERN NATIONAL BANK OF NEW YORK.

I direct that a writ of error from the Circuit Court of Appeals for the Second Circuit be sued out in this case.

CHARLES G. DAWES,
Comptroller of the Currency.

Office Comptroller of the Currency,
Washington, D. C., January 25, 1899.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the City of New York, this 9th day of September, in the year one thousand eight hundred and ninety-seven.

[L.S.]

JOHN A. SHIELDS,
Clerk.

EDWARD WINSLOW PAIGE,
Plaintiff's Attorney.
Office and Post Office Address,
44 Cedar Street,
New York City.

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Wednesday, the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable E. HENRY LACOMBE,
Circuit Judge.

F. WINDSOR ROBINSON, Receiver, &c.,

vs.

SOUTHERN NATIONAL BANK.

Now comes the plaintiff by Edward Winslow Paige, Esq., his attorney.

Likewise comes the defendant by William B. Hornblower, Esq., its attorney.

Thereupon a jury is empanelled and the cause proceeds to trial.

After hearing the evidence for the plaintiff the jury by direction of the Court say they find a verdict for the defendant, and so they say all.

Thereupon the Court grants a stay of sixty days to the plaintiff in which to make and serve a case, with leave to turn the same into a bill of exceptions.

An Extract from the Minutes.

[L. S.] JOHN A. SHIELDS,
Clerk.

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

Plaintiff

against

THE SOUTHERN NATIONAL BANK,

Defendant.

Plaintiff shows to the Court, on information and belief:—

I.—That the State National Bank of Vernon, Texas, was and, except as hereinafter stated, is a national banking association organized under the laws of the United States.

II.—That on the eighteenth of August, 1894, the said banking association was insolvent and closed its doors, and the Comptroller of the Currency, after due examination, became satisfied of its insolvency, and upon the twenty-fourth day of September, 1894, appointed the plaintiff Receiver. That the plaintiff accepted such appointment, entered upon the duties of his trust and has since been engaged in their performance, and for the purpose of winding up the affairs of such banking association he now brings this action by the direction of the Comptroller of the Currency.

That the assets of such association are not, and

have not at any time since the eighteenth of August, 1894, been sufficient to pay its liabilities within the sum of fifty thousand dollars. That the capital of said banking association was fifty thousand dollars.

III.—That prior to the first day of February, 1895, the Comptroller of the Currency became satisfied, after due examination, of the fact that the assets would not pay the liabilities within fifty thousand dollars, and thereupon determined to make and did make an assessment upon the capital stock of said banking association and the owners of the same, equal to the par value of such stock, viz: the sum of fifty thousand dollars.

IV.—That the defendant is a national banking association organized and existing under the laws of the United States and located in the City of New York, and has been so since and before the twentieth of January, 1893.

That on the twentieth of January, 1893, one W. G. Curtis was the owner of one hundred and eighty shares of the capital stock of the said State National Bank, of the par value of one hundred dollars each, which stood in his name on the books of the bank and for which he held the usual certificates. That on that day one A. U. Thomas and the said Curtis made their promissory note in the words and figures as follows:

"$15,000. New York, Jany. 20, 1893.

"Four months after date, for value received, "we promise to pay to the order of 'The Southern "National Bank of New York' at said Bank in "the City of New York, in funds current at the "New York Clearing House fifteen thousand dol- "lars, having deposited with said Bank as col- "lateral security for payment of this or any other

" liability or liabilities of ours to said Bank, now " due or to become due, or that may be hereafter " contracted, the following property, viz: One " hundred and Eighty (180 shares of the Capital " stock of The State National Bank of Vernon, as " evindenced by Cts. No. 97 150 Shs., Ctf. No. 98 " 30 Shs. the market value of which is now " $18,000, with the right on the part of said " Southern National Bank of New York, from " time to time, to demand such additional security " as said Bank may deem sufficient should the " market value thereof decline, and upon our " failure to comply with any such demand, this " obligation shall forthwith become due, with full " power and authority to said Bank or assigns, in " case of such default or of the non-payment of " any of the liabilities above mentioned at ma- " turity, to sell, assign and deliver the whole, or " any part of such securities, or any substitutes " therefor or addition thereto, at any broker's " board, or at public or private sale, at the option " of said Bank, at any time or times thereafter, " without advertisement or notice to us *and with* " *the right on the part of said Bank to become* " *purchasers thereof*, at said sale or sales, freed " and discharged from any equity or redemption. " And after deducting all legal or other costs and " expenses for collection, sale and delivery, to " apply the residue of the proceeds of such sale or " sales so made, to pay any, either or all of said " liabilities, as said Southern National Bank, of " New York, shall deem proper, returning the " overplus to the undersigned; and we will still " remain liable for any amount so unpaid.

" W. G. CURTIS,
" A. U. THOMAS,"

and, for valuable consideration, delivered the same to the defendant, and also then delivered to the

defendant as collateral security as above the said certificates for the said stock, endorsed in blank by the said Curtis and with the power of attorney on the back of each executed in blank by the said Curtis.

That the said note was not paid when due and is still wholly unpaid, except as hereinafter stated.

That on the *first day of August, 1893*, the said defendant *advertised the said stock* to be sold on the eighth day of August, 1893, at noon, by Richard V. Harnett and Company, Auctioneers, at the public exchange where such sales in New York are usually made, and on the first day of August, 1893, it gave to the said Thomas and Curtis notice in writing by telegraph that said sale would be made on the eighth of August as aforesaid. That at the time and place where said sale was advertised to be made as aforesaid, and of which notice had been given to the said Curtis and Thomas as aforesaid, the said sale was made by the said auctioneers and the stock was sold at public auction to the defendant for the sum of twenty dollars, that being the highest sum bidden for the same and the defendant being the highest bidder. That the defendant paid the said sum of twenty dollars to the said auctioneers and received from them the sum of twelve dollars, being the said purchase price less the auctioneers' fee of eight dollars, and thereupon the defendant credited upon said note by an endorsement in writing thereon the said proceeds of said sale and immediately brought suit in the District Court of Wilbarger County, Texas, against both the said Curtis and the said Thomas for the balance due upon the said note after crediting the proceeds of the sale of the stock as aforesaid.

That the said certificates for such stock remained in the possession of the defendant from the time of

the said sale until after the making of the assessment by the Comptroller of the Currency, as aforesaid, but the same have not been transferred upon the books of the bank in Texas.

V. That on the twenty-first of July, 1893, the State National Bank of Texas had suspended and was in possession of the United States bank examiner from that date until the fourteenth of September, 1893, when it reopened for business and continued to transact business as usual until the eighteenth of August, 1894, when it finally closed as aforesaid, and that the fact of such suspension and that the bank examiner was in charge was known to the defendant on the twenty-sixth of July, 1893.

VI.—That at February term of 1894, the said Curtis and Thomas reconvened in the said suit in Texas and alleged the invalidity of the aforesaid sale of the stock and prayed for damages because of the same, and such proceedings were afterwards had in such suit that the trial court, being the said District Court of Texas, having full jurisdiction, and there being parties to the said suit the said Curtis and Thomas and the defendant, found as a fact after the trial of said action, as follows: "On "the 8th day of August, 1893, plaintiff caused said "shares of stock to be sold at public auction in "New York City, when plaintiff became the pur- "chaser at $20, paid the auctioneer $8 costs of sale, "and credited defendants' note with $12, and on "the 10th day of August, 1893, brought this suit "to recover of the said Curtis and Thomas the "balance due on said $15,000 note."

On appeal from judgment entered upon the decision containing the above findings, the Civil Court of Appeals of Texas held as follows: "In accor- "dance with the terms of the contract pledging

"this stock, appellant" (the defendant in this action) "caused the same to be publicly sold on "the stock market in New York, and became the "purchaser thereof for $20, just prior to the bring-"ing of the suit," and by its judgment the said Civil Court of Appeals affirmed the finding of the District Court above quoted.

Wherefore plaintiff demands judgment against the defendant for Eighteen thousand dollars, with interest from the time of the making of the assessment by the Comptroller of the Currency, and costs.

EDWARD WINSLOW PAIGE,
Attorney for the Plaintiff,
44 Cedar Street,
New York.

NORTHERN DISTRICT OF NEW YORK, Schenectady County, } ss:

EDWARD WINSLOW PAIGE, being duly sworn, says that he is the attorney for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is not made by the plaintiff is because the plaintiff is not a resident of the State of New York, but is a resident of the State of Texas and is now out of the State of New York and the jurisdiction of the Court.

EDWARD WINSLOW PAIGE.

Sworn to before me this eighth day of September, 1897.

EDWARD D. PALMER,
[SEAL.] Notary Public.

(Endorsed): "U. S. Circuit Court, So. Dist. of N. Y., F. Winslow Robinson, as Receiver, etc., Plaintiff.—against The Southern National Bank, Defendant.—Copy Complaint. Edward Winslow Paige, Attorney for Plaintiff, 44 Cedar Street, New York City."

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver, etc.,
Plaintiff,

vs.

THE SOUTHERN NATIONAL BANK,
Defendant.

} Answer.

The defendant answering the complaint alleges:

I.—Referring to the allegations in the paragraph of the complaint numbered IV., this defendant denies the statement as to the partial payment of the note as therein contained. This defendant denies the allegations of paragraph IV. of the complaint as to the alleged sale to the defendant of the stock of the State National Bank of Vernon, Texas, therein mentioned, except as hereinafter admitted. This defendant admits that the certificates of stock mentioned in the complaint were as matter of form struck off to this defendant at public auction, this defendant having bidden therefor twenty dollars ($20), and having nominally purchased said certificates. The defendant furthermore alleges in regard to the facts there set forth that the stock was never transferred on the books of the State National Bank of Vernon, Texas, and that Thomas and Curtis insisted from the time when such stock was struck off at auction, that there had been no valid sale or transfer of title thereof, and defendant avers that it made such purchase of said stock solely for its own protection as pledgee and it never claimed unqualified title to said stock, but expressly disclaimed such title, and at all times thereafter held the stock subject to redemption by Thomas and

Curtis and subject to their order upon payment of the amount of their note with interest, and so notified said Thomas and Curtis, and defendant tendered said stock in the suit in Texas referred to in paragraph numbered VI. of the complaint herein. The final judgment in such suit, as rendered by the Court of Civil Appeals of Texas, adjudged to this defendant the full face of the note with interest, and adjudged the title to the bank stock to be in Thomas and Curtis, and decreed the stock to them as tendered.

II.—Referring to the allegations contained in the paragraph of the complaint numbered VI., the defendant denies that the facts there stated were found by the Civil Court of Appeals of Texas, but on the contrary, defendant avers that what was found and adjudicated by said Court was that Thomas and Curtis were indebted to the defendant in the full amount of the note set forth in the complaint, and by the final judgment of the said Court of Appeals in the said suit of Southern National Bank of New York against Curtis and others, it was found, adjudicated and decreed as follows:

> "We therefore adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant [that is, the present defendant in this action] against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered."

Wherefore defendant demands judgment that the complaint be dismissed.

HORNBLOWER, BYRNE, TAYLOR & MILLER,
Attorneys for Defendant,
Office and Post Office Address,
30 Broad Street, New York City.

City and County of New York, ss.:

WALTER S. JOHNSTON, being duly sworn, says that he is an officer of the defendant herein; that he has read the foregoing answer, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. The reason why this verification is made by deponent and not by the defendant is that the defendant is a corporation; that the sources of deponent's knowledge and the grounds of his belief as to the matters not stated as of his own knowledge are various papers relating to the matters in controversy.

WALTER S. JOHNSTON.

Sworn to before me, this 1st day of December, 1897.

CLIFFORD E. DUNN,
Notary Public,
Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

(Endorsed): "U. S. Circuit Court, Southern District of New York.—F. Windsor Robinson as Receiver, etc., *vs.* The Southern National Bank.—Answer—Hornblower, Byrne, Taylor & Miller. Attys. for Deft., 30 Broad St., N. Y."

IN THE UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

SOUTHERN NATIONAL BANK.

COSTS OF THE DEFENDANT, SOUTHERN NATIONAL BANK.

Docket fee.....	$20.00
Clerk's fees on entering Judgment.	4.50
Marshal's fees on execution.....	1.45
	$25.95

Taxed at the sum of Twenty-five 95/100 dollars this 16th day of December, 1898.

JOHN A. SHIELDS,
Clerk.

I hereby consent that costs in the above-entitled action be adjusted at Twenty-five and 95/100 dollars in accordance with the above, waive notice of taxation, and consent that judgment be entered herein for the above amount.

EDWARD WINSLOW PAIGE,
Attorney for Plaintiff.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

SOUTHERN NATIONAL BANK.

The summons in this action having been personally served on the defendant, Southern National Bank, and the defendant having duly appeared by Hornblower, Byrne, Taylor & Miller and answered, and the issues in this action having come on for trial on the 26th day of October, 1898, before Hon. E. Henry Lacombe, Circuit Judge, and a jury having been duly impaneled and sworn, and the plaintiff having appeared by counsel, and the defendant having appeared by counsel, and verdict having been rendered in favor of the defendant by the direction of the Court on that day, and the defendant's costs having been taxed at twenty-five and $\frac{95}{100}$ dollars, now on motion of Hornblower, Byrne, Taylor & Miller, attorneys for the defendant, Southern National Bank, it is

Adjudged, that the defendant, Southern National Bank, have judgment upon the issues herein against the plaintiff, F. Windsor Robinson, as Receiver of the concerns of the State National Bank of Vernon, Texas.

And further adjudged, that the defendant,

Southern National Bank, do recover of the plaintiff, F. Windsor Robinson, as Receiver, the sum of twenty-five and $\frac{95}{100}$ dollars, its costs and disbursements.

Judgment signed this 16th day of December, one thousand eight hundred and ninety-eight.

JOHN A. SHIELDS,
Clerk.

[Endorsed]: "Filed Dec. 16, 1898."

(Endorsed): "Circuit Court, Southern Dist., N.Y. —F. Windsor Robinson as Receiver, etc., against Southern National Bank.—Copy, Judgment.—Hornblower, Byrne, Taylor & Miller, Attorneys for Defendant, 30 Broad Street, New York, U. S. Circuit Court. Filed Dec. 16, 1898, 4.30 P. M. John A. Shields, Clerk."

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

Be it remembered that on the twenty-sixth day of October, 1898, before the Circuit Court of the United States for the Southern District of New York, held by Judge Lacombe, the issues in this case were tried to a jury in the presence of Edward Winslow Paige for the plaintiff and William B. Hornblower and Howard A. Taylor for the defendant, and the plaintiff having opened his case, read in evidence a stipulation and the facts therein stated as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver, &c.,

against

THE SOUTHERN NATIONAL BANK.

Stipulation.

It is hereby stipulated and agreed on behalf of the parties hereto as follows:

On the 1st day of August, 1893, the defendant

notified Curtis and Thomas by telegraph that the stock would be sold on the eighth day of August, 1893.

On the 7th day of August, 1893, it advertised in the New York papers, where such things are usually advertised, that the stock would be sold at noon on the 8th day of August, 1893. On the 8th day of August, 1893, at noon, at the Public Exchange in New York, the stock was by direction of the defendant put up for sale by Richard V. Harnett, Auctioneer, at public auction, and was struck off to the defendant for the sum of twenty dollars, the defendant being the highest bidder, and that being the highest sum bid for it. That the defendant then paid to Richard V. Harnett the twenty dollars, and afterwards received back from him that sum, less his fees.

That was the place where, and the way in which sales of collateral to such notes were then made in New York.

The foregoing facts are admitted, however, without prejudice to the right of either party upon the trial to introduce oral proof as to the terms and circumstances of the sale, and without prejudice to defendant's claims as to the legal effect of the said purchase and sale.

It is further stipulated and agreed, that either party may read in evidence, subject to objections to materiality, copies of letters or telegrams from or on behalf of the Southern National Bank, with like effect as if the originals were produced.

The foregoing stipulation shall apply only to the first trial of this action, and shall not be binding on either of the parties hereto in case of any second or further trial hereof, should any such trial hereafter take place by reason of reversal of

the judgment hereafter obtained herein or otherwise.

Dated New York, May 13, 1898.

Attorneys for Plaintiff.
HORNBLOWER, BYRNE, TAYLOR & MILLER,
Attorneys for Defendant.

and then read in evidence the following telegram:

"NEW YORK, July 31, 1893.

"H. C. THOMPSON,

"Vernon, Texas,

"DEAR SIR:

"We telegraphed you this day as follows: "Stock will bring only nominal price but this will "fix amount balance to sue for. It will be con- "trolled by us; Wire yes or no, as to our proposi- "tion about fee. If no we must engage some other "lawyer.

"W. W. FANNING,
"President."

The plaintiff then read in evidence an exemplified copy of pleadings and decision of the County Court of Wilbarger County, Texas, as follows:

STATE OF TEXAS,

COUNTY OF WILBARGER.

THE SOUTHERN NAT'L BANK OF NEW YORK, *vs.* No. 688. W. G. CURTIS & A. U. THOMAS.	In the District Court of Wilbarger County, Texas, To Feby. Term, 1894.

To the Hon. G. A. BROWN, *Judge of said Court:*

Your petitioner, The Southern National Bank of New York, hereinafter styled plaintiff, complain-

ing of W. G. Curtis and A. U. Thomas hereinafter styled defendants, would most respectfully show to the Court that plaintiff is a resident corporation of the City and State of New York and domiciled therein, and duly and legally incorporated under and by virtue of the laws of the United States of America and that the defendants are each resident citizens of the County of Wilbarger in the State of Texas.

That on heretofore, to wit: on Jany. 20th, 1893, the defendants made and executed their certain promissory note in writing bearing date on the day and year last aforesaid for the sum of fifteen thousand dollars payable to the order of plaintiff herein four months after date for value received, that no rate of interest was specified in said note but that the same bears interest at the rate of six per cent. per annum from maturity, a copy of which said note is hereto attached and made a part hereof and marked "Exhibit A."

That said note was duly delivered to the plaintiff by the defendants for a valuable consideration, who are now the legal and equitable owners and holders thereof. That at the date and delivery of said note to the plaintiff, the defendants also delivered and pledged as collateral security to secure the payment of said note one hundred and eighty shares of the capital stock of the State National Bank of Vernon, as evidenced by Crft. No. 97 for 150 shares, and Crft. No. 98, 30 shares. That by the terms of said note the plaintiff was authorized and empowered on default of the payment thereof to sell said capital stock of the State National Bank of Vernon, at any broker's board in New York City, or at public or private sale at the option of plaintiff Bank at any time or times after maturity thereof without advertisement or notice to the defendants, and with the right on the part of the

said Bank, to become purchasers thereof at said sale or sales freed and dischared from any equity of redemption, that the net proceeds of the sale of said stock were to be credited on said note.

That at the maturity of said note the defendants failed and refused to pay the same or any part thereof, although payment has been demanded of them at said plaintiff Bank oftentimes.

That on the 8th day of August, 1893, said above-mentioned collateral security was duly and properly sold according to the terms of the note herein sued on in the City of New York and the net proceeds thereof, amounting to twenty dollars, applied as a credit on said note.

That the balance, to wit, the sum of fourteen thousand nine hundred and eighty dollars still remains due and unpaid, besides interest, which the defendants have wholly neglected and refused to pay, although often demanded of them, to plaintiff's damages in the sum of twenty thousand dollars. That according to the terms of said note they became liable and promised to pay the same.

Wherefore, premises considered, plaintiff prays that defendants be cited to answer this petition that it have judgment against said defendants for the amount due on said note for its damages, interest, costs of suit and general relief.

H. C. THOMSON,
Atty. for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK	
vs.	Suit pending in the District Court of Wilbarger County, Texas. Feby. Term, 1895.
W. G. CURTIS, A. U. THOMAS and H. C. THOMSON.	

Now comes the plaintiff, the Southern National

Bank of New York, and in vacation files this its first amended original petition herein, intending thereby to amend its original petition filed herein August 10th, 1893, and for said amendment plaintiff says:

That it is a National Bank duly incorporated under the laws of the United States of America, doing business in the City and State of New York. That at the institution of its suit firm defendants A. U. Thomas and W. G. Curtis each resided in Wilbarger County, Texas, and that said defendants have been duly cited herein and are now before the court in this cause. That defendant H. C. Thomson is a resident of Wilbarger County, Texas, and is also made defendant hereto by plaintiff.

That heretofore, to wit, on 20th January, 1893, the said defendants W. G. Curtis and A. U. Thomas, for value received made, executed and delivered to plaintiff their certain promissory note in writing, bearing date on the day and year last aforesaid, whereby they promised plaintiff to pay it or its order four months after date the sum of $15,000. That no rate of interest is specified in said note, but under the laws of the State of Texas same bears interest at 6 per cent. per annum from its date. A copy of said note is attached hereto as part hereof marked Exhibit A. That said note is long since due, and, though its payment has often been demanded of the said defendants, they have refused and still refuse to pay same or any part thereof to plaintiff's damage $20,000.

That prior to filing this suit the plaintiff placed said note in the hands of the defendant H. C. Thomson for collection and remittance to them, and after filing suit in this cause and after the defendants A. U. Thomas and W. G. Curtis—— the Court herein, and the Court had fully—— said sum herein and of the said note, the said H. C.

Thomson did unlawfully and fraudulently and without the consent of plaintiff converted said note to his own use, and is now claiming ownership and title thereto; said note is of the value and worth $20,000. And though possession has often been demanded of him by plaintiff, he refuses to deliver same to plaintiff, to its damage $20,000.

The defendants are notified to produce said note at the trial hereof, or secondary evidence of its contents will be then offered by plaintiff. Wherefore, plaintiff asks that citation issue herein to said H. C. Thomson, commanding him to appear and answer herein at the next term of this Court for judgment against him for the possession of said note, and that he be required to produce same at the trial hereof and deliver same into Court here, and in the event he fails to do this, that a judgment against him for its value and for judgment against said A. U. Thomas and W. G. Curtis for the said sum of $15,000, with interest, and for judgment against said A. U. Thomas, W. G. Curtis and H. C. Thomson for costs and general and special relief, etc., etc.

R. P. ELLIOTT,
Attorney for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK *vs.* No. 688. A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas.

Now comes the Southern National Bank of New York, and leave of the Court being first had, files this its first supplemental petition, and for such petition says:

Plaintiff excepts to each and every ground of defense or cross action, except the general denial, in defendants' first amended original answer con-

tained, and says that the same are each and all wholly insufficient in law to require further answer thereto, and of this plaintiff prays judgment of the Court.

H. C. THOMSON,
Attorney for Plaintiff.

1st.—Plaintiff specially excepts to defendants' said answer herein wherein it charges damages, by reason of the sale of said stock during a financial depression, because said answer shows upon its face that plaintiff had the right to sell said stock and any time after default in payment of the note.

2nd.—Plaintiff further specially excepts to defendants' answer wherein it seeks to have the stock pledged by defendants foreclosed upon and sold by this Court, because this would be varying the terms of the contract or pledge, as shown by defendants' answer.

Wherefore, plaintiff prays judgment of the Court.

H. C. THOMSON,
Attorney for Plaintiff.

Further answering herein, plaintiff denies all and singular the allegations in defendants' original answer contained, and of this it puts itself upon the country. Wherefore plaintiff prays judgment.

H. C. THOMSON,
Attorney for Plaintiff.

THE SOUTHERN NAT'L BANK OF NEW YORK
vs.
A. U. THOMAS *et al.*

In District Court of Wilbarger County, Texas. Feby. Term, 1895.

PLAINTIFF'S 2ND SUPPLEMENTAL PETITION.

Now comes the plaintiff the Southern National Bank of New York, and by leave of the Court files

this its 2nd Supplemental Petition herein and for said supplemental petition plaintiff says:

1st. It excepts to the 2nd amended answer of defendants Thomas & Curtis and the plea of reconvention of the defendant Thomson herein because it says that said answer nor said plea of reconvention neither states facts sufficient to constitute a defense or cause of action herein against plaintiff.

2nd. Specially excepting to said answer of said defendants Thomas & Curtis, plaintiff says the allegations there as to sale of the bank stock by it are insufficient and states no facts to show that said Curtis & Thomas have been damaged by reason of said sale.

3rd. Because the allegations there as to the sale of said stock by plaintiff in depressed terms states no cause of action against plaintiff and is insufficient to have any damages upon. Because the said answer fails to allege the value of the bank stock in the City of New York, the authorized place for the sale of same under the pledge of same as collateral security.

4th. Because defendant's plea of accord and satisfaction shows no definite agreement consideration therefor paid to plaintiff by defendant or that same was ever executed or accepted.

5th. Specially excepting to the plea of reconvention by the defendant Thompson, plaintiff says—1st, that the matters alleged therein are in no way connected with, resultant from or (?) to the main action upon which this suit is instituted by plaintiff herein.

6th. (2), Because the amended petition of plaintiff herein by which H. C. Thomson is made a defendant to this cause the facts alleged against him

in said petition are in the nature of an action *ex delicto* or for unliquidated or uncertain damages founded upon a tort, whereas said defendant's plea of reconvention is for an action arising upon an alleged debt due him by plaintiff upon an alleged contract both expressed and implied, and which said defendant so pleaded in reconvention is not founded upon any cause of action arising out of, incident to or consistent with plaintiff's said cause of action against the said H. C. Thomson and the said alleged indebtedness of the said H. C. Thomson arises from a separate and distinct cause of action.

7th. (3), Because the count of the said H. C. Thomson to his plea of reconvention herein in which he undertakes to plead an implied premium and *quantum meruit* against plaintiff, fails to allege that plaintiff ever promised to pay the said H. C. Thomson any sum for his services therein. Wherefore plaintiff prays judgment of the Court.

ELLIOTT & LUCKY,
Attorneys for Plaintiff.

8th. And answering herein, plaintiff denies all and singular the allegations to said amended answer of the said Thomas & Curtis. And the said 1st amended answer and plea of reconvention of the said H. C. Thomson, contained and of this it puts itself upon the country.

9th. Specially answering herein further, plaintiff says that they deny that they employed the said H. C. Thomson as attorney to represent them herein to sue alone on the said notes of said Thomas & Curtis and to foreclose their lien upon the bank stock mentioned heretofore herein, and that they agreed to pay him the sum of $100 cash as a return and 10 per cent. of the amount he might secure herein against said Thomas & Curtis; but the

plaintiff alleges the facts to be, to wit: That it employed the said H. C. Thomson to bring the suit against the said Thomas & Curtis, upon the note sued upon herein by it and to litigate said cause to a final judgment, against the said Thomas & Curtis, and to pay him for all such services the sum of $100 as a retainer in cash, which it has done, and the further sum of 10 per cent. on the amount he might be able to collect out of the said Thomas & Curtis, upon the said note. And that at the time of the said employment of the said Thomson it was contemplated, agreed and understood by and between the plaintiff and said Thomson, that the said compensation so agreed upon as aforesaid was to fully recompense the said Thomson for any and all services he might render plaintiff to said cause, to its completion and final consummation. And that after said Thomson had brought this suit under the contract above stated, that he drew upon and demanded the payment of by plaintiff of various large sums of money claimed by him to be due him in services herein which plaintiff had not agreed to pay him, and did not and refused to pay him, by reason of which said refusal by plaintiff to pay him said sums of money so demanded as aforesaid, the said Thomson refused to further prosecute said cause herein as attorney for plaintiff, and voluntarily withdrew and abandoned said cause, thereby enforcing and compelling plaintiff to employ other and additional counsel to represent it in said cause, and plaintiff has fully paid said Thomson all amounts due him as its attorney herein under said contract or otherwise, and plaintiff avers that the said Thomson handled and managed this cause for it in a skillful and prudent manner, and as a skillful and prudent attorney would manage suits of a similar character; but that upon the other hand plaintiff alleges that

the management of said suit by the said Thomson, as attorney for plaintiff, was of an unskillful, careless and grossly negligent manner, and that his management of said cause resulted in great complications, impediments, injuries and damages to plaintiff.

Wherefore, plaintiff says the said Thomson is not entitled to any judgment against it by reason of his plea of reconvention herein, and it prays judgment dismissing him, for its costs, and general and special relief, etc.

ELLIOTT & LUCKY,
Attys. for Plaintiff.

SOUTHERN NAT. BANK OF NEW YORK *vs.* No. 688. A. U. THOMAS & W. G. CURTIS *et al.*	In the District Court, Wilbarger County, Texas, Feby. Term, 1895.

Now comes the plaintiff in the above-entitled and numbered cause, by leave of the Court had and obtained, and files this its amended second supplemental petition in lieu of its second supplemental petition filed herein Feby. 5th, 1895, and makes the same read as follows, to wit:

1st. Plaintiff excepts to defendants Thomas & Curtis's answer and plea of reconvention for damages herein, for that the facts therein alleged are insufficient in law to warrant a recovery thereon—wherefore it prays the judgment of the Court.

2nd. Plaintiff specially excepting, says the allegations of facts therein as to sale of Bank stock by it are insufficient to show that said defendants have been damaged by reason of said sale, or that plaintiff violated its contract with defendants in the

manner in which said Bank stock was sold—wherefore plaintiff prays the judgment of the Court.

3rd. Plaintiff further specially excepting says, that the allegation in said answer, "that the plaintiff, Triebert and Harnett & Co., entered into a combination and conspiracy with each other to defraud these defendants and buy said stock for a nominal sum of money," are insufficient in law, for that the same are too general, and fail to allege the fact, constituting the alleged combination and conspiracy—wherefore, it prays the judgment of the Court.

4th. Plaintiff further specially excepting to the allegations in said answer wherein it is stated "that while the said plaintiff pretended to give notice of sale to these defendants, it gave the notice in so short a time as to render it impossible for these defendants, or either of them, to be present thereat to protect their interest, and further, the notice given these defendants failed to give the place where the sale would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of sale to protect their interest in the sale of stock, for that said facts, if true, do not show that plaintiff violated any contract, truth or duty it owed defendants, for that plaintiff had the right as per the allegations theretofore in said answer, "in case of default or nonpayment of said note at maturity to sell, assign and deliver the whole or any part of securities at any brokers' board, or at public or private sale at the option of said Bank, at any time thereafter without advertisement or notice to defendants, and

with the right on the part of said Bank to become purchaser thereof at said sale or sales, free and discharged from any equity of redemption." And it further appears, that said bank stock was sold after the maturity, default and non-payment of the note, for which said bank stock was pledged to secure, and that, therefore, it was not incumbent on plaintiff to give to defendants any notice to redeem before proceeding to sell said bank stock—wherefore plaintiff prays the judgment of the Court.

5th. Plaintiff further specially excepting because the said answer fails to allege the value of the bank stock in the City of New York, the authorized place of the sale of same, under the pledge as herein or in this cause set forth—wherefore it prays the judgment of the Court.

6th. Plaintiff further specially excepting because defendants' plea of accord and satisfaction fails to allege facts showing a definite agreement, a consideration therefor passing from defendants to plaintiff, or that the same was ever executed or accepted—wherefore it prays the judgment of the Court.

7th. Plaintiff further specially excepting to the defendant H. C. Thomson's plea of reconvention herein: 1st. Because the facts therein alleged are insufficient in law to constitute a cause of action against the plaintiff. 2d. Because the matters of fact alleged therein are in no way connected with, resultant from or incidental to the main action, upon which this suit is instituted by plaintiff herein—wherefore it prays the judgment of the Court.

8th. Plaintiff further specially excepting because the said Thomson, in his said plea of recon-

vention herein in which he undertakes he pleads an implied contract and *quantum meruit* against plaintiff, fails to allege that plaintiff ever promised to pay him, the said Thomson, any sum for his services—wherefore it prays the judgment of the Court.

9th. And answering herein plaintiff denies all and singular the allegations in said amended answer of the said Thomas and Curtis contained, and also the said first amended answer and plea of reconvention of the said H. C. Thomson contained, and demands strict proof of the same, and of this it puts itself upon the country.

10th. And specially answering said plea of accord and satisfaction interposed by the defendants Thomas and Curtis, plaintiff avers and alleges that there was no definite agreement between plaintiff and said defendants thereto; that there was no consideration passing from said defendants to plaintiff to support the same; that if there was a definite agreement upon a valid consideration, which is not admitted but denied, the same was not executed. And further, plaintiff avers that if it ever agreed to the alleged accord and satisfaction pleaded by said defendants, it was induced to do so by the false and fraudulent representations of said defendants as to the value of said bank stock, the said defendant Thomas having represented to plaintiff that said bank stock was worth 80 cents on the dollar, when in truth and in fact said bank stock had no value, but was entirely worthless, void; defendants knew at the time it was worthless. That plaintiff relied on said false and fraudulent representations so made by the defendant Thomas as aforesaid and plaintiff was thereby induced to accept the proposition for defendants to confess judgment in this suit for amount sued for. And that said judgment

to be credited to the amount of sixty cents on the dollar of the eighteen thousand of the bank stock so pledged to plaintiff by the said defendants.

That plaintiff further avers that at the time of the acceptance of said proposition the State National Bank of Vernon was in an insolvent condition, and soon thereafter said bank failed and went into the hands of a Receiver, and so now remains.

That plaintiff at the time knew nothing of the condition and solvency of said bank or the value or intrinsic worth of the one hundred and eighty shares of the capital stock of the State National Bank of Vernon pledged to it as aforesaid, and had it known or been informed of the true condition and solvency of said bank, or value or intrinsic worth of said bank stock, it would not under any circumstances have accepted said proposition of settlement; therefore plaintiff says that if said agreement ever had any validity or binding efficacy on plaintiff, it should be relieved therefrom, because of the said false and fraudulent representations as to the value of said bank stock. Plaintiff further says that said defendants were to confess judgment at the August Term of this Court, August, 1894, which they failed to do—wherefore plaintiff puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

11th. Plaintiff, further answering herein, avers that the defendants Thomas and Curtis deposited with plaintiff as collateral security for payment of the note here sued on the said one hundred and eighty shares of the capital stock of the State National Bank of Vernon, with the written agreement and understanding (the right and authority on the part of plaintiff) that in case of default or non-payment of said note at maturity, to sell, assign

and deliver the whole or any part of such securities or any substitute therefor or additions thereto, at any brokers' board, or at public or private sale, at the option of plaintiff, at any time or times thereafter, without advertisement or notice to said defendants and with the right on the part of plaintiff to become purchasers thereof at said sale or sales, freed and discharged from any equity of redemption. Therefore, if plaintiff proceeded to sell said bank stock (after maturity of said note and default in the payment thereof) without giving said defendants notice of said sale, they are estopped from complaining thereat, because of said defendants' written contract and agreement as aforesaid—wherefore it puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

12th. Further answering herein as to the defendant H. C. Thomson, plaintiff says it denies that it employed said Thomson as attorney to represent it herein to sue alone on said note of said A. U. Thomas & W. G. Curtis and to foreclose its lien upon the bank stock heretofore mentioned, and that it agreed to pay him the sum of one hundred dollars cash as a retainer and ten per cent. of the amount he might recover against said Thomas & Curtis. But the plaintiff here now alleges the facts to be, that it employed the said H. C. Thomson to bring suit against the said Thomas & Curtis upon the note sued on herein, and to litigate said cause to a finish and final judgment against the said defendants Thomas & Curtis, and agreed to pay him for all such services the sum of one hundred dollars as a retainer. in cash (which amount it paid him), and the further sum of ten per cent. upon the amount he might collect from the said Thomas & Curtis upon the said note. And that at the time

of the employment of the said Thomson it was covenanted and agreed and understood by and between the plaintiff and said Thomson that the said compensation so agreed upon as aforesaid was to fully recompense the said Thomson for any and all services he might render plaintiff in said cause to its complete and final consummation. And that thereafter said Thomson had brought the suit under the contract above stated, that he drew upon and demanded the payment by plaintiff of various large sums of money, claimed by him to be due him for services rendered by him herein, which plaintiff had not agreed to pay him, and did not and refused to pay him, by reason of which said refusal by plaintiff to pay him said sums of money so demanded as aforesaid the said Thomson refused to further to prosecute this cause as attorney for plaintiff, and voluntarily withdrew from and abandoned said cause, thereby enforcing and compelling plaintiff to employ another and additional counsel to represent it herein, and plaintiff has fully paid said Thomson for all services rendered by him herein.

And plaintiff denies that said Thomson handled and managed but in a skillful and prudent manner, as a skillful and prudent attorney would manage suits of a similar character, but that, upon the other hand, plaintiff avers that the management of said suit by said Thomson as attorney for plaintiff was of an unskillful, careless, reckless and imprudent and grossly negligent manner, and that his management of same resulted in great complications, impediments, injuries and damages to plaintiff.

Wherefore, plaintiff puts itself upon the country.

ELLIOTT & LUCKY,
Attys. for Plff.

THE SOUTHERN NAT'L BANK OF NEW YORK *vs.* W. G. CURTIS *et al.*	Suit pending in the District Court of Wilbarger County, Texas, Feby. Term, 1895.

PLAINTIFF'S 3RD AMENDED PETITION.

Now comes the plaintiff, the Southern National Bank of New York, and after obtaining leave of the Court, filed herein its 3rd Amended Petition, intending thereby to amend its 2nd amended petition filed herein on the day of 1895, and for such amendment plaintiff says: That plaintiff is a corporation duly incorporated under the laws of the United States of America as a national bank doing business in the City and State of New York, and that the defendants A. U. Thomas and W. G. Curtis were residents of Wilbarger County, Texas, at time of filing of this suit, and as such properly before the Court, having been duly cited herein.

That heretofore, to wit, on January 20th, 1892, the said defendants, A. U. Thomas and W G. Curtis, made, executed and delivered to plaintiff for value received of it their certain promissory note in writing, bearing date on the day and year last aforesaid, payable to the order of plaintiff, for the sum of $15,000, four months after its date; that no rate of interest is specified in said note, but plaintiff alleges that under the law said note bears interest at 6 per cent. per annum from its date until paid.

Plaintiff here files what in its opinion is a copy of said note, and that if the copy filed is not a true copy thereof plaintiff cannot file a more perfect copy thereof, as the original note is not in its possession, but in the possession of one H. C.

Thomson, who refuses to deliver same to plaintiff or allow it to inspect the same, and said attached copy is asked to be made a part of this petition, and is attached hereto and marked Exhibit A for identification, and that plaintiff is the owner and holder of said note. That there appears to be endorsed on the said copy of said note, and plaintiff presumes said endorsement is also on the said original, note now in the possession of the said H. C. Thomson, the following credit, to wit: "Credited by cash proceeds of sale of stock Twenty Dollars, Aug. 8th, 1893." Which said credit so entered and indorsed as aforesaid is improper and incorrect, and should not have been so entered for that the plaintiff does not claim any right or title to said bank stock, by reason of any attempted or pretended sale of same, but that plaintiff now holds said bank stock as collateral security only, as it has heretofore done, and as fully stated in the said note sued on herein.

That the said bank stock has at all times since the execution and delivery of the note sued on herein been in the possession and under the control of the plaintiff, and plaintiff has always been ready and willing at any and all times, and is now ready and willing to return to defendants the said bank stock upon the payment by them of the said note here sued on by it. And the plaintiff here now tenders in open court to the said defendants the said bank stock upon the payment by them of the said note aforesaid.

That by reason of the said execution and delivery of the aforesaid note by defendants to plaintiff, they became liable to and promised to pay plaintiff, at the maturity thereof, the sum specified herein, with interest as aforesaid. And though payment has often been by it demanded of the said defendants, they have failed, refused and still

fail and refuse to pay same or any part thereof, to plaintiff's damage $20,000.

Wherefore, plaintiff prays judgment of the Court against the said defendants for the amount of said note, with interest and cost, and for general and special relief as in duty bound, etc.

ELLIOTT & LUCKY,
Attys. for Plaintiff.

$15,000. NEW YORK, May 20th, 1893.

Four months after date, for value received, we promise to pay to the order of "The Southern National Bank, of New York," at said Bank, in the City of New York, in funds current at the New York Clearing House fifteen thousand dollars, having deposited with said Bank as collateral security for payment of this or any other liability or liabilities of ours to said Bank, now due or to become due, or that may be hereafter contracted, the following property, viz.: one hundred and eighty (180) shares of the capital stock of the State National Bank of Vernon—as evidenced by

Ctft. No. 97, 150 Sh's
" 98 30 "

(copy) ———————

The market value of which is now $18,000, with the right on the part of said Southern National Bank, of New York, from time to time, to demand such additional collateral security as said Bank may deem sufficient should the market value thereof decline, and upon our failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to said Bank or assigns, in case of such default or of the nonpayment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions

thereto, at any brokers' board, or at public or private sale at the option of said Bank, at any time or times thereafter, without advertisement or notice to us, and with the right on the part of said Bank to become purchasers thereof at said sale or sales, freed and discharged from any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as said Southern National Bank, of New York, shall deem proper, returning the overplus to the undersigned; and we will still remain liable for any amount so unpaid.

"Exhibit A" W. G. CURTIS.
725 A. U. THOMAS.

THE SOUTHERN NATIONAL BANK OF NEW YORK
vs.
W. G. CURTIS *et al.*

In the District Court of Wilbarger County, Texas. Feby. Term, 1894.

Now comes the defendant, and deny all and singular the allegations in the plaintiff's petition contained, and demand strict proof of the same.

STEPHENS & HUFF,
Attys. for Defts.

And further answering herein defendants say, the note sued on has been fully paid off, discharged by before the institution of this suit. The plaintiff, The Southern National Bank of New York, having taken the stock that these defendants placed with their collateral security for the indebtedness sued on and declared in the instrument sued on by the plaintiff. That the plaintiff has taken

said stock on the 8th day of August, 1893, which was on said date worth the sum of $18,000, in full satisfaction for said note. Wherefore, defendants ask to be discharged, with their costs.

STEPHENS & HUFF,
Attys. for Defts.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas. February Term, 1894.

Now comes the defendants A. U. Thomas and W. G. Curtis and, after leave of the Court first had and obtained, files this their amended original answer in the place of their original answer heretofore filed on the day of February, 1894, so as to read as follows:

Defendants deny all and singular the allegations in the plaintiff's petition contained and demand strict proof of same, and of this put themselves upon the country.

STEPHENS & HUFF,
Attorneys for the Defendants.

And by way of cross petition and further answer herein these defendants allege and show that they executed the note in the plaintiff's petition described for the sum of ($15,000) fifteen thousand dollars payable to the order of the "Southern National Bank of New York" and to secure the payment of said note these defendants deposited with said Bank as collateral security one hundred and eighty shares of the capital stock of the State National Bank of Vernon evidenced by certificate No. 97 for 150 shares and certificate No. 98 for 30

shares with power on the part of the plaintiff or assigns in case of default or the non-payment of said note at maturity to sell, assign and deliver the whole or any part of the securities at any broker's board or at public or private sale at the option of said Bank, at any time thereafter without advertisement or notice to defendants and with the right on the part of said Bank to become purchasers thereof at said sale or sales freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the State National Bank of Vernon and for one hundred dollars for each share, aggregating the sum of and representing eighteen thousand dollars of the capital stock of said State National Bank.

That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular and has done so for the purpose of cheating and defrauding these defendants out of said stock and of holding over these defendants the entire debt for which said stock was given to secure. That the plaintiff instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Co., a firm in New York City of whom these defendants had no knowledge, and who were never in any way authorized by these defendants to sell said stock. Nor was the plaintiff authorized by these defendants in any way to substitute any one in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the plaintiff was a gross and palpable violation of the trust in reference to the sale of said stock. That while these defendants waived the notice and advertisement of the sale, they did not waive their rights under the law to receive

notice to redeem the pledge, and that the plaintiff procured the sale of said stock to be made as aforesaid without giving these defendants notice to redeem the stock as it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out; that said sale and purchase was made on the 8th day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars and paid the said Harnett & Co. eight dollars of that for making the sale. That the plaintiff, Treibert and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock for a nominal sum of money. That while the said plaintiff pretended to give notice of sale to these defendants, that it gave the notice in so short a time as to render it impossible for these defendants or either of them to be present thereat to protect their interest, and further, the notice given these defendants failed to give the place, when the sale would be made and by whom it would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of sale to protect their interest in the sale of the stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock aforesaid, adverse to all rights and claims of these defendants, that it has converted the said stock to its own use and benefit and thereby became liable

to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the fraudulent and wrongful acts of the plaintiff as aforesaid, the plaintiff became liable to these for the value of the stock at the date of the filing of the competition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars. That by reason of such wrongful acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for that sum of money, but that it has wholly failed and refused to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff the 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, and that the said plaintiff caused the said Harnett & Co. to sell the stock in the manner and form as above set out, and for the purposes as therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and of the law and powers as aforesaid on the said 8th day of August, 1893. That on said date aforesaid there was a general financial depression all over the country, and in business and in financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon owing to such financial depression and want of confidence in the banking institutions of the United States then existing in the business and financial world. That owing to the financial stress then generally prevailing, the State National Bank of Vernon suspended business for a short time as was so suspended at the date of the sale of said stock.

That while there was no market value for the said stock at said date, it possessed an actual and intrinsic value for the purposes of banking, or as stock upon which dividends would finally be declared, and as an investment of good security; the sum of eighty-five cents on the dollar, as of the aggregate value of the 180 shares of fifteen thousand three hundred dollars, but that said stock is now, and at the time of the answer of these defendants, worth the sum of eighteen thousand dollars. That by the wrongful and fraudulent acts of plaintiff, and its breach of trust as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in the said sum, but has refused to pay the same or any part thereof.

And further answering herein, these defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon deposited with the plaintiff the certificate of stock above set out under the powers hereinbefore mentioned. That the pledge as herein stated was for the mutual benefit and interest of the plaintiff and these defendants. That the plaintiff accepted the same and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale and care of handling said stock. But although the plaintiff had so accepted said trust and undertook to use reasonable diligence in the sale of the same and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale of said stock as to sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by defendants to plaintiff. That

it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry off at public outcry in the midst of a financial panic when securities of all kinds and classes were of uncertain sale, and without in any way ascertaining the true value of the stock and without attempting to inform the public who attend auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledges at all entering into consideration, forced such stock upon the market when it was bound to know nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid the plaintiff only realized the sum of twenty dollars, when in fact the same was of the value of fifteen thousand three hundred dollars, the sum being the real intrinsic value of said stock as hereinbefore set out. That by reason of all which these defendants have been damaged in the sum of eighteen thousand dollars, whereby the plaintiff became liable to these defendants in said sum of money to pay the same or any part thereof, the plaintiff has wholly failed and refused to do, to defendant's great damages.

Wherefore, these defendants sue to recover their damages as above set out and pray that the amount so received be set off against the note, and that if there should be any excess over and above the amount of the note that they may be due thereon, that they have judgment therefor over against the plaintiff, and for such and further equitable relief as they may be entitled in good conscience and for general relief.

STEPHENS & HUFF,
Attys. for Defts.

That these defendants allege as they have heretofore stated and alleged, the pledge of said stock in the manner and form as above set out for the purpose of securing the defendant as therein set out. That the same was sold in the irregular and fraudulent manner aforesaid and purchased by the plaintiff as hereinbefore set out, under all the irregularities, as hereinbefore set out. That these defendants allege the value of said stock to be as set out in the several counts or allegations of this cross petition hereinbefore pleaded. That the plaintiff held all this great amount of property which was of the great values hereinbefore stated in trust for the purpose of selling and paying said note, but that by reasons of its wanton and fraudulent acts, as hereinbefore stated, the stock was sold. at which sale plaintiff purchased all of said stock at the grossly inadequate and inconceivable price of twenty dollars, and thereby defrauded these defendants of their rights in said stock.

Wherefore, these defendants ask this Court to set aside the sale, if the Court should find they are not entitled to receive its value upon conversion or for damages as herebefore prayed for, and that they have a decree foreclosing the lien on said stock and that it be sold under the order of this Court, and that the Court direct the payment of the proceeds in the note and for such other and further relief as in law or equity these defendants may be entitled, and for general relief.

STEPHENS & HUFF,
Attys. for Defendant.

The Southern National Bank of New York *vs.* No. 688. A. U. Thomas *et al.*	In the District Court of Wilbarger County, Texas. February Term, A. D. 1895.

First Amended Answer of Defendant H. C. Thomson.

Now comes defendant H. C. Thomson, one of the defendants in the above-styled cause, and amends his original answer filed herein Dec. 6th, 1894, and for such amendment pleads as follows:

The said H. C. Thomson denies all and singular the allegations contained in plaintiff's first amended original petition filed herein on Dec. 5th, 1894, and demands proof thereof.

Basham & Hall,
Attys. for Deft. Thomson.

Count No. 1.

And specially answering herein, and pleading in reconvention against the plaintiff, defendant H. C. Thomson charges that on or about the 10th day of August, 1893, he, as attorney for the plaintiff in this suit, by special contract filed suit No. 688 in the District Court of Wilbarger County, Texas, and styled The Southern National Bank of New York *vs.* W. G. Curtis and A. U. Thomas, on a note for fifteen thousand dollars ($15,000.00) less a credit of $20.00 entered August 8th, 1893. That said defendants Thomas and Curtis were duly cited in said cause and made answer to plaintiff's cause of action. That by the terms of the contract of employment made by plaintiff with this defendant Thomson, the plaintiff agreed and promised to pay this defendant the sum of one hundred dollars ($100.00) in cash as a retainer for filing said suit,

and ten per cent. of the amount of said above mentioned note. That he might recover from said Thomas and Curtis by suit on said note, save and except that the services charged to have been performed by defendant Thomson, as specified and set out in second count of this answer, were not included in said contract by the parties thereto.

That this defendant in his conduct and management of said lawsuit managed same in a skillful and prudent manner, and as a skillful and prudent attorney would do in suits of a similar character. That this defendant prepared and filed interrogatories to various parties in the City of New York, and had them taken and filed in said cause to make proof of the allegations and facts set forth in plaintiff's original petition, filed in said cause in said suit No. 688. That this defendant, as attorney for the plaintiff, managed and conducted said cause from on or about the 10th day of August, 1893, for about one year, and had the same fully prepared and ready for trial. That some time in the month of August, 1894, this defendant was unable to give the exact date, the plaintiff settled and compromised said suit with defendants Thomas and Curtis, whereby the said plaintiff agreed and accepted in settlement thereof $18,000 face value of the capital stock of the State National Bank of Vernon, Texas, at Vernon, Texas, at the price of sixty cents on the dollar, or a total of ten thousand and eight hundred dollars, for said stock and for the balance of said debt on which said suit No. 688 was brought, the defendants Thomas and Curtis were to confess judgment in favor of the plaintiff. That said settlement was fully agreed to by the plaintiff and defendants Thomas and Curtis, and that if said settlement was not fully carried out it was no fault of this defendant nor of defendants Thomas and Curtis. That said settlement was made

without the knowledge of this defendant, and said suit was taken out of his hands without his consent, for the purpose of making said settlement. That said settlement was made for a valuable consideration, and binding on the parties thereto; that by the terms of plaintiff's contract with this defendant he is entitled to receive the sum of one thousand and eighty dollars from the plaintiff on account of said settlement, which they have never paid him, but fail and refuse to make payment thereof, and do now fail and refuse to pay, for which said amount this defendant is entitled to judgment in addition to the sum of money claimed in the second count of this answer, and for which this defendant now prays judgment of the Court, and that he be allowed to retain the note now in his possession until all sums due him from the plaintiff be fully paid.

BASHAM & HALL and H. C. THOMSON,
Attys. for Deft. Thomson.

Count No. 2.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* No. 688 A. U. THOMAS *et al.*	In the District Court of Wilbarger County, Texas. February Term, A. D. 1895.

And further specially answering herein, and pleading in re-convention against the plaintiff, defendant H. C. Thomson charges that on or about the 10th day of August, 1893, he as attorney for the plaintiff herein, at its special instance and request, filed suit No. 688, in District Court of Wilbarger County, Texas, styled, The Southern National Bank of New York *vs.* W. G. Curtis and A. U. Thomas, on a note for $15,000.00, fifteen

thousand dollars, less a credit of $20.00, twenty dollars, entered Aug. 8th, 1893. That said defendants Curtis and Thomas were duly cited in said cause and made answer to plaintiff's cause of action, and reconvened in damages against the plaintiff by answer filed on or about the 8th day of February, 1894, in said cause No. 688, claiming damages in the sum of eighteen thousand dollars against plaintiff for the wrongful conversion of certain bank stock in the City of New York on or about the 8th day of August, 1893, alleged to belong to and the property of defendants Thomas and Curtis. That the defendant Thomson, as attorney for said bank, plaintiff herein, and in his capacity as attorney-at-law, and at the special instance and request of plaintiff herein filed defensive pleadings to the said claim for damages of said Thomas and Curtis in said cause No. 688, and also took a great deal of testimony in the City of New York and elsewhere, to defend, controvert and resist said claim for damages brought in reconvention by said Thomas and Curtis in said cause No. 688, and otherwise performed valuable and substantial service in defense of said action in reconvention for damages from August 10th, 1893, up to on or about Aug. 10th, 1894; that this defendant resisted motions to suppress plaintiff's testimony and made agreements, valuable and profitable to plaintiff in said cause; that said services in so resisting, defending and controverting said cross action for damages were not embodied or included in the contract set forth in Count No. 1 of this answer, and the same were and are reasonably worth the sum of twelve hundred dollars; that on or about the said August 10th, 1894, the plaintiff herein discharged defendant Thomson from said cause No. 688, and refused to allow him to further conduct said cause, and refused to pay him for his services

therein rendered without any fault or negligence on the part of the said Thomson in the management or conduct of said cause. That said Thomson during the conduct and management of said cause managed the same in a skillful and prudent manner and as a prudent and skillul attorney would do in suits of a similar character; that the reason plaintiff discharged defendant Thomson was because this defendant demanded of it a reasonable compensation for the services rendered, and to be rendered in the defense of the cross action of Thomas and Curtis, and notified said Thomson that it would fail and refuse to pay him, the said Thomson, for the services at a reasonable price he had performed in said cause No. 688, in defense of said cross action for damages, or would perform in the future, and notified said Thomson that it would pay nothing therefor. But no notice was ever given the said Thomson that his services would not be paid for until said suit No. 688 was fully ripe for trial, and had so been prepared by said Thomson, at the special instance and request of plaintiff.

Defendant Thomson further charges that he has an attorney's lien on the note set out and described in plaintiff's petition, and that said note is now in his possession, and came into his possession as attorney for the plaintiff, and while engaged in the management of this action; that plaintiff has failed and refused, and still fails and refuses, to pay this debt, the said sum of twelve hundred dollars, due for the services performed and set forth in this the second count of defendant's answer.

Wherefore, premises considered, this defendant prays for judgment, for the said sum of twelve hundred dollars, alleged to be due in the Second Count hereof, and also the further sum one thousand and eighty dollars, alleged to be due in the First Count of this answer, aggregating the sum of

twenty-two hundred and eighty dollars, together with interest on each sum, at the rate of 6 per cent. per annum, from August 10th, 1894, and that he be allowed to retain the note in his possession until all sums due him by the plaintiff be fully paid, for further costs of suit and general relief.

H. C. THOMSON and BASHAM & HALL,
Attys. for Defendant Thomson.

THE SOUTHERN NATIONAL BANK OF NEW YORK *vs.* W. C. CURTIS *et al.*	In the District Court of Wilbarger County, Texas. February Term, 1895.

Now come the defendants W. G. Curtis and A. U. Thomas, and after leave of the Court first had and obtained, file this their third amended original answer in lieu of their second amended original answer, filed herein on the 14th day of September, 1894, and make the same read as follows:

1st. Defendants deny all and singular the allegations in plaintiff's petition contained, and demand strict proof of the same; and of this they put themselves upon the country.

STEPHENS & HUFF,
Attys. for Defendants.

And by way of cross petition and further answer herein, these defendants allege and show that they have executed the note in plaintiff's petition contained and described for the sum of fifteen thousand dollars, payable to the order of "The Southern National Bank of New York," and to secure the payment of said note these defendants deposited with said Bank as collateral security one

hundred and eighty shares of the capital stock of "The State National Bank of Vernon," evidenced by Certificate No. 97 for 150 shares, and certificate for 30 shares, with power on the part of plaintiff or assigns, in case of default or non-payment of said note at its maturity, to sell, assign and deliver the whole or any part of the securities at any broker's board, or at public or private sale at the option of said bank, at any time thereafter, without advertisement or notice to defendants, and with the right on the part of said Bank to become purchaser thereof at said sale or sales, freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the "State National Bank of Vernon," and for one hundred dollars for each share, aggregating the sum and representing eighteen thousand dollars of the capital stock of said State National Bank of Vernon.

That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out, and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular, and has done so for the purpose of cheating and defrauding these defendants out of said stock, and of holding over these defendants the entire debt for which said stock was given to secure.

That the plaintiff, instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Company, a firm in New York City, of whom these defendants had no knowledge, and who were never in any way authorized by defendants to sell said stock; nor was the plaintiff authorized by these defendants in any way to substitute any one else in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the

plaintiff was a gross and palpable violation of its trust in reference to the sale of said stock. That while these defendants waived the notice and advertisement of sale, they did not waive their right under the law to receive notice to redeem the stock or it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out. That said sale and purchase was made on the 8th day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars and paid the said Harnett & Co. eight dollars of that for making the sale. That plaintiff Trieber and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock at a nominal sum of money. That while the said plaintiff pretended to give notice to these defendants, it gave the notice in so short a time as to render it impossible for these defendants, or either of them, to be present thereat or to protect their interest; and further, the notice given these defendants failed to give the place where the sale would be made, and by whom it would be made, and these defendants believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Company, and were thereby prevented from being present either in person or by agent at the place of sale to protect their interest in the sale of said stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock aforesaid, adverse to all rights and claims of these

defendants, that it has converted the said stock to its own use and benefit, and thereby became liable to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the said fraudulent and wrongful acts of the plaintiff, the plaintiff became liable to these defendants for the value of said stock at the date of the filing of the cross petition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars.

That by reason of such wrongful acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for that sum of money, but that it has wholly failed to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff the 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, &c. That plaintiff caused the said Harnett & Co. to sell said stock in the manner and form above set out, and for the purposes therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and the law and powers as aforesaid, on the 8th day of August, 1893.

That on said date as aforesaid, there was a general financial depression all over the country, and in business and financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon, owing to such financial depression and want of confidence in the banking institutions of the United States, then existing in the business and financial world. That owing to the financial stress then prevailing generally, the State National

Bank of Vernon suspended business for a short time, and was so suspended at the date of the sale of the said stock. That while there was no market value for the said stock at said date, it preserved an actual and intrinsic value for the purpose of banking, or as stock upon which dividends would finally be declared, and as an investment of good security the sum of eighty-five cents on the dollar, or of the aggregate value for the 180 shares of fifteen thousand three hundred dollars, but that said stock is now at the time of the answer of these defendants worth the sum of eighteen thousand dollars.

That by the wrongful and fraudulent acts of plaintiff and its breach of trust as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in said sum, but has refused to pay the same or any part thereof.

And further answering herein, the defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon, deposited with the plaintiff the certificate of stock above set out under the powers hereinbefore mentioned.

That the pledge herein stated was for the mutual benefit and interest of plaintiff and these defendants. That the plaintiff accepted the same and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale, care and handling of said stock. But although plaintiff had accepted said trust and undertaken to use reasonable diligence in the sale of the same, and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale

of said stock as to sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by these defendants to plaintiff. That it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry off at public outcry in the midst of a financial panic when securities of all kind and classes were of uncertain sale, and without in any way ascertaining the true value of the stock, and without attempting to inform the public who attended auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledgors at all entering into the consideration, forced such stock upon the market when it was bound to know that nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid, the plaintiff realized only the sum of twenty dollars when in fact the same was of the value of fifteen thousand dollars, the same being the real and intrinsic value of said stock as hereinbefore set out. That by reason of all of which these defendants have been damaged in the sum of fifteen thousand dollars, whereby the plaintiff became liable to these defendants in said sum of money, but to pay the same or any part thereof plaintiff has wholly failed and refuse to do, to defendants' great damage.

Wherefore, these defendants ask to receive their damages as above set out, and pray that the amount so recovered be set off against the note, and that if there should be any excess over and above the amount of the note, that there may be due thereon, that they have judgment therefor over against the plaintiff, and for such other and further equitable

relief as they may be entitled in good conscience and for general relief.

STEPHENS & HUFF,
Attys. for Defts.

Since the filing of the cross petition heretofore on the 8th day of August, 1894, the plaintiff, for a valuable consideration, and for the purpose of settling the litigation in and about the stock which these defendants allege plaintiff wrongfully sold and converted as hereinbefore set out, and for the purpose of saving any further costs in regard to said cross action for said stock and the wrongful conversion of same, made and entered into a contract with these defendants to settle said suit. That the same was made through one M. J. Tompkins. That said Tompkins was duly authorized by defendants to make a proposition to the plaintiff to settle said litigation, which proposition was duly made by said Tompkins to plaintiff, which was duly accepted, and which proposition and acceptance was in substance, that these defendants would acknowledge the justness of the indebtedness sued upon by plaintiff, and that they would confess judgment for said sum sued for, and that these defendants should have a credit on said judgment for an amount equal to sixty cents on the one dollar on said stock. That there was 180 shares of stock of said bank of the value of one hundred dollars per share, and that sixty cents on the dollar would aggregate $10,800 dollars. That under said agreement aforesaid, these defendants are entitled to a credit for said sum of $10,800 on the judgment. That these defendants are now ready and willing to carry out their contract and agreement entered into as aforesaid, and will now confess judgment for said amount sued for upon credit for said $10,800 being given them.

Wherefore, they pray that said agreement be carried out and put into execution, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

SOUTHERN NATIONAL BANK OF NEW YORK
vs. No. 688.
W. G. CURTIS *et al.*
Sept. 9th, 1895.

This cause having been reached for trial several days prior to this date, and all parties having by attorneys announced ready for trial and submitted all questions of law as well as of fact to the Court, without the intervention of a jury. The Court, after hearing the evidence and argument of counsel, took said case under consideration and returned into Court this day his judgment and findings of fact and law. The Court finds the plaintiff is entitled to recover on said note the sum of sixteen thousand two hundred dollars ($16,200), principal and interest on the note sued on up to the 9th day of August, 1894, the time the agreement of compromise was entered into by and between plaintiff and defendants W. G. Curtis and A. U. Thomas; and that under said agreement said defendants are entitled to a credit of ten thousand eight hundred dollars ($10,800), and that the plaintiff is now entitled to recover from defendants, W. G. Curtis and A. U. Thomas, principal, and interest on the remainder after deducting said ten thousand eight hundred dollars ($10,800), the sum of five thousand seven hundred and fifty-one dollars ($5,751.00), with interest thereon at the rate of six per cent. per annum from this date.

It is therefore ordered, adjudged and decreed by

the Court that the plaintiff, The Southern National Bank of New York, a corporation, do have and recover of and from the defendants, W. G. Curtis and A. U. Thomas, the sum of five thousand seven hundred and fifty-one dollars ($5,751), with interest thereon from the date of this judgment at the rate of ten per cent. per annum, together with all costs in this behalf expended, for which the plaintiff may have its execution. And it further appearing that one of the defendants, H. C. Thomson, was made a party defendant by the plaintiff and sued for damages, and that the said H. C. Thomson reconvened and sued the plaintiff for legal services herein, the Court finds that the said H. C. Thomson is entitled to recover of the plaintiff the sum of one thousand dollars ($1,000) for such services, and that the plaintiff having withdrawn and abandoned its claim for damages against the said H. C. Thomson prior to the trial hereof, but after filing said petition for damages and service of process on the said H. C. Thomson, and after the said H. C. Thomson had filed his answer and plea of reconvention, take nothing as against the defendant H. C. Thomson.

It is therefore ordered, adjudged and decreed by the Court that the said H. C. Thomson do have and recover of and from the plaintiff, The Southern National Bank of New York, the sum of one thousand dollars ($1,000), with interest thereon at the rate of six per cent. per annum from the date of this judgment, and all costs in this behalf expended, for which he may have his execution.

It is further ordered that the officers of this Court may have execution in their behalf against each party for the costs incurred by them respectively, for which they may have execution. To all of which plaintiff then and there excepted, and gave notice of appeal to the Court of Civil Appeals

of the Second Supreme Judicial District of Texas. And the plaintiff is granted ten days by the Court, from and after the adjournment of this Court, in which to prepare and file a statement of facts in this cause.

(Certificate of True Copy.)

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original pleadings now on file, together with the final judgment in the case of The Southern National Bank of New York *vs.* A. U. Thomas *et al.*, now on file in said Court, in Cause No. 688.

Given under my hand and seal of said Court, at office in the town of Vernon, this the 24th day of March, A. D. 1898.

[SEAL.]

W. B. TOWNSEND,
Clerk District Court Wilbarger County, Texas.

By C. P. SMITH, Deputy.

THE STATE OF TEXAS, }
Wilbarger County. }

I, G. A. BROWN, Judge of the 46th Judicial of Texas, including Wilbarger County, do hereby certify that W. B. Townsend, whose name is signed in the foregoing certificate, is the duly elected, qualified and acting Clerk of the District Court in and for Wilbarger County, and that C. P. Smith is his qualified and acting deputy, and that the signature of the said C. P. Smith to the

foregoing certificate is genuine, and that said attestation is in due form.

Given under my hand and the seal of
[SEAL.] the District Court this the 26th day of March, 1898.

G. A. BROWN,
Judge 46th Judicial District of Texas.

THE SOUTHERN NATIONAL BANK OF NEW YORK No. 688. *vs.* W. G. CURTIS *et al.*	In the District Court of Wilbarger County, Texas. August Term, A.D. 1894.

Now come the defendants W. G. Curtis and A. U. Thomas, and after leave of the Court first had and obtained, file this their Second Amended Original Answer in lieu and stead of their other answer heretofore filed February 5th, 1894, and amend original answer February 8th, 1894, and cause the same to read as follows:

1st. Defendants deny all and singular the allegations in plaintiff's original petition contained, and demand strict proof of same. And of this they put themselves upon the country.

STEPHENS & HUFF,
Attys. for Defendants.

And by way of cross petition and further answer herein, these defendants allege and show that they executed the note in plaintiff's petition described for the sum of fifteen thousand dollars ($15,000), payable to the order of "The Southern National Bank of New York," and to secure the payment of said note these defendants deposited with said Bank as collateral security one hundred and eighty shares of the capital stock of "the State National

Bank of Vernon," evidenced by certificate No. 97 for 150 shares and certificate 98 for 30 shares, with power on the part of plaintiff or assigns in case of default or the non-payment of said note at maturity to sell, assign and deliver the whole or any part of the securities at any broker's board, or at public or private sale at the option of said bank, at any time thereafter without advertisement or notice to defendants, and with the right on the part of said Bank to become purchaser thereof at said sale or sales, freed and discharged from any equity of redemption. That the shares of stock so pledged were for the capital stock of the State National Bank of Vernon, and for one hundred dollars for each share, aggregating the sum of and representing eighteen thousand dollars of the capital stock of the said State National Bank of Vernon. That the plaintiff took said stock and agreed to hold and sell the same under the powers of the written pledge above set out, and in accordance with the law, but that said plaintiff has violated its trust and undertaking in every particular, and has done so for the purpose of cheating and defrauding these defendants out of said stock and of holding over these defendants the entire debt for which said stock was given to secure. That the plaintiff, instead of selling the stock itself under the powers granted by the defendants in the pledge as aforesaid, employed R. V. Harnett & Co., a firm in New York City and of whom these defendants had no knowledge, and who were never in any way authorized by defendants to sell said stock; nor was the plaintiff authorized by these defendants in any way to substitute any one in its place to sell said stock. That the employment of the said R. V. Harnett & Co. by the plaintiff was a gross and palpable violation of its trust in reference to the sale of said stock. That while these defendants

waived the notice and advertisement of sale, they did not waive their right under the law to receive notice to redeem the pledge, and that the plaintiff procured the sale of said stock to be made as aforesaid without giving the defendants notice to redeem the stock or it would be sold as required by law. That the plaintiff employed one F. B. Trieber to purchase the stock for it at the sale above set out; that said sale and purchase was made on the eighth day of August, 1893, and that on said day the said Trieber did purchase the said stock at the nominal sum of twenty dollars, and paid the said Harnett & Co. eight dollars of that for making the sale. That the plaintiff, Trieber and Harnett & Co. entered into a combination and conspiracy with each other to defraud these defendants and buy the said stock for a nominal sum of money. That while the said plaintiff pretended to give notice of sale to these defendants, it gave the notice in so short a time as to render it impossible for these defendants or either of them to be present thereat to protect their interest; and, further, the notice given these defendants failed to give the place where the sale would be made, or by whom it would be made; and these defendants, believing that the same would be made by the Bank, as it was authorized to do, and by no one else, did not and could not get any one to be present at the sale made by Harnett & Co., and were thereby prevented from being present in person or by agent at the place of the sale to protect their interest in the sale of the stock.

That by reason of the wrongful acts aforesaid of the plaintiff, and in procuring the sale of said stock in the illegal and wrongful manner aforesaid, and in violation of its trust as aforesaid, and in purchasing said stock at such illegal and void sale aforesaid, and setting up title in itself to the stock

aforesaid adverse to all right and claim to these defendants, that it has converted the said stock to its own use and benefit, and thereby became liable to these defendants for the value of said stock, which these defendants allege and show was the sum of eighteen thousand dollars at the date of said conversion as aforesaid. That by reason of the said fraudulent and wrongful acts of the plaintiff, the plaintiff became liable to these defendants for the value of the said stock at the date of the filing of the cross petition of these defendants against the plaintiff, which these defendants aver was the sum of eighteen thousand dollars. That by reason of such wrong acts these defendants have been damaged in the sum of eighteen thousand dollars, and the plaintiff became liable to them for the said sum of money, but that it has wholly failed to pay the same or any part thereof.

These defendants would further allege and show to the Court, as set out in the above allegations, that they pledged to the plaintiff 180 shares of stock aforesaid on the terms therein stated, and the plaintiff accepted the trust, &c. That said plaintiff caused the said Harnett & Co. to sell the said stock in the manner and form as above set out, and for the purpose as therein alleged, and in the illegal and wrongful manner therein stated, and in violation of its trust and the law and powers as aforesaid on the said 8th day of August, 1893. That on said date aforesaid, there was a general financial depression all over the country and in business and financial circles, and that there was then no market value anywhere for the capital stock of the State National Bank of Vernon, owing to such financial depression and want of confidence in the banking institutions of the United States then existing in the business and financial world. That owing to the financial stress then prevailing gen-

erally, the State National Bank of Vernon suspended business for a short time, and was so suspended at the date of the sale of the said stock. That while there was no market value for the said stock at said date, it preserved an actual and intrinsic value for the purposes of banking, or as stock upon which dividends would finally be declared, and as an investment of good security, the sum of eighty-five cents on the dollar, or of the aggregate value for the 180 shares of fifteen thousand three hundred dollars, but that said stock is now and at the time of the answer of these defendants worth the sum of eighteen thousand dollars. That by the wrongful and fraudulent acts of plaintiff, and its breach of trust, as hereinbefore set out, it has converted said stock to its own use and benefit, and has thereby damaged these defendants in the sum of eighteen thousand dollars, whereby plaintiff became liable to these defendants in said sum, but has refused to pay the same or any part thereof.

And further answering herein, these defendants allege and show to the Court that they executed the note sued on by the plaintiff, and as collateral security thereon deposited with the plaintiff the certificates of stock above set out under the powers hereinbefore mentioned. That the pledge herein stated was for the mutual benefit and interest of the plaintiff and these defendants. That the plaintiff accepted the same, and was thereby bound to use the care and diligence a reasonably prudent man would be required to use in his own affairs, in the sale, care and handling of said stock. But, although the plaintiff had accepted said trust, and undertook to use reasonable diligence in the sale of the same, and to get a fair price and valuation therefor, it conducted itself with such negligence and indifference in the sale of said stock as to

sacrifice the property at a mere nominal sum, and thereby failed to realize anything to credit on the note executed by these defendants to plaintiff. That it undertook to sell the stock and get the best price obtainable therefor, but it negligently and carelessly caused the same to be placed in the hands of an auctioneer to cry out at public outcry in the midst of a financial panic when securities of all kind and classes were of uncertain sale, and without in any way ascertaining the true value of the stock, and without attempting to inform the public who attend auctions of that kind of the value of the stock, but that it negligently and without the interest of the pledgees at all entering into the consideration, forced such stock upon the market when it was bound to know that nothing could be realized on said stock, or it could have known it by the use of any sort of diligence. That by its negligent and careless demeanor in the sale of said stock as aforesaid the plaintiff realized only the sum of twenty dollars, when in fact the same was of the value of fifteen hundred dollars, the same being the real and intrinsic value of said stock, as hereinbefore set out. That by reason of all of which these defendants have been damaged in the sum of eighteen hundred dollars, whereby the plaintiff became liable to these defendants in said sum of money, but to pay the same, or any part thereof, plaintiff has wholly failed and refused to do, to defendant's great damage.

Wherefore these defendants ask to receive their damages as above set out, and pray that the amount so recovered be set off against the note, and that if there should be any excess over and above the amount of the note that may be due thereon that they have judgment therefor over against the plaintiff, and for such other and further

equitable relief as they may be entitled in good conscience, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

That these defendants allege, as they have heretofore stated and alleged, the pledge of said stock in the manner and form as above set out, for the purpose of securing the debt as therein set out; that the same was sold in the irregular and fraudulent manner aforesaid and purchased by the plaintiff as hereinbefore set out, under all the irregularities as hereinbefore set out. That these defendants allege the value of said stock to be as set out in the several counts or allegations of this cross position hereinbefore pleaded. That the plaintiff held out this great amount of property, which was of the great value hereinbefore stated, for the purpose of selling and paying said note, but that by reason of its wanton and fraudulent acts as hereinbefore stated that said stock was sold, but at which sale the plaintiff purchased all of said stock at the grossly inadequate and unconscionable price of twenty dollars, and thereby defrauded these defendants of their rights and equities in said stock.

Wherefore, these defendants ask this Court to set aside said sale, if the Court should find that they are not entitled to recover its value upon conversion or for damages as hereinbefore prayed for, and that they have a decree foreclosing the lien on said stock, and that it be sold under the order of this Court, and that the Court direct the payment of the proceeds on the note, and for such other and further relief as in law or equity these defendants may be entitled, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

That since the filing of the cross petition of de-

fendants heretofore on the 8th day of August, 1894, the plaintiff for a valuable consideration, and for the purpose settling the litigation made and entered into a contract with and through M. J. Tompkins to settle said suit, that he, the said Tompkins, was duly authorized to act for the plaintiff, and that he, the said Tompkins, was authorized to make proposition to the plaintiff for these defendants, which he did, and which proposition was duly accepted by plaintiff, and which was in substance that these defendants would confess judgment in the suit, for amount sued for, and that they should have a credit for sixty cents on the dollar on said stock sold by the plaintiff and placed as collateral security on said indebtedness. These defendants aver the aggregate amount of credit which they would be entitled under said agreement would be the sum of ten thousand eight hundred dollars ($10,800). That they are now ready and willing to carry out their contract and agreement, provided the plaintiff will give them the credit as above set out.

Wherefore, they pray that said agreement be carried out and put into execution, and for general relief.

STEPHENS & HUFF,
Attorneys for Defendants.

(Certificate of True Copy.)

THE STATE OF TEXAS, }
County of Wilbarger. }.

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original defendants' second amended original answer in the case of the Southern National

Bank of N. Y. *vs.* W. G. Curtis *et al.*, now on file in said Court, in cause No. 688.

Given under my hand and seal of said
[SEAL.] Court, at office in the Town of Vernon, this the 18th day of April, A. D. 1898.

W. B. TOWNSEND,
Clerk District Court, Wilbarger County, Texas.

By C. P. SMITH, Deputy.

THE STATE OF TEXAS, }
Wilbarger County. }

I, G. A. BROWN, Judge of the District Court in and for Wilbarger County, Texas, do hereby certify that W. B. Townsend is the duly elected, qualified and acting clerk of said District Court, and that C. P. Smith is his lawful and acting deputy, and that the certificate of the said District Clerk as the same appears above is in due form and the signature of the said C. P. Smith thereon is genuine.

Given under my hand and the seal of the
[SEAL.] said Court this the 19th day of April, 1898.

G. A. BROWN,
Judge Forty-sixth Judicial District of Texas, including Wilbarger County.

The plaintiff then read in evidence the findings in that case in the District Court and the Civil Court of Appeals, as follows:

SOUTHERN NAT. BANK OF NEW YORK *vs.* CURTIS *et al.* } (Court of Civil Appeals of Texas. June 27, 1896.)

Appeal from District Court, Wilbarger County, G. A. Brown, Judge.

Action by the Southern National Bank of New

York against W. G. Curtis and others. From the judgment rendered, plaintiff appeals. Reversed.

Conclusions of fact found by the trial Court, and adopted by the Court of Civil Appeals in its opinion.

"January 20, 1893, the defendants W. G. Curtis and A. U. Thomas executed and delivered to the plaintiff, the Southern National Bank of New York, their promissory note for $15,000, payable four months after date, at the office of said bank, in the city of New York, and at the same time deposited with said bank, as collateral security for said note, 180 shares of stock of $100 each, of the State National Bank of Vernon, Tex., and which stock was then estimated and agreed to be of value $18,000. The written contract between plaintiff and Curtis and Thomas stipulated, among other things, that, if said note was not paid at maturity, the said plaintiff bank should have the right to sell said bank stock at any broker's board, or at public or private sale, at any time after such default of payment without advertisement or notice to the said Curtis and Thomas, and with the right of said plaintiff bank to purchase said shares of stock free from any equity of redemption, and, after deducting legal costs of sale, the proceeds of said shares of stock were to be applied on said $15,000 debt, etc. Said $15,000 note was not paid, and, after the same became due, plaintiff bank offered to extend time of balance if Curtis and Thomas would pay $5,000; and by telegram of June 2d, and by letter of June 7th, both addressed to W. G. Curtis, at Vernon, defendants were informed that, unless plaintiff's proposition was complied with by June 20th, said bank stock would be sold at public auction in New York, and legal proceedings instituted for any deficiency. Defendants Curtis and Thomas failed to comply with the above-mentioned prop-

osition, or to make any other arrangements relative to said note, and on 8th August, 1893, plaintiff caused said shares of stock to be sold at public auction in New York City, when plaintiff became the purchaser at $20, paid the auctioneer $8 cost of sale, and credited the defendants' note with $12 and on the 10th day of August, 1893, brought this suit to recover of the said Curtis and Thomas the balance due on said $15,000 note. At the February Term, 1894, of this court, the defendants Curtis and Thomas answered said suit, charging an illegal sale of said bank stock, and a conversion thereof by plaintiff, to the damage of the said Curtis and Thomas $18,000. August 9, 1894, while suit was still pending on the issues made by the answer of Curtis and Thomas above stated, and for the purpose of settlement of this suit between them, plaintiff bank and Curtis and Thomas, through said Thomas, who was acting for both defendants, entered into an agreement that plaintiff would allow Curtis and Thomas 60 cents on the dollar for said bank stock, and they (Curtis and Thomas) were to confess judgment in plaintiff's suit on said note. This court was in session during the entire months of August and September, 1894, but was temporarily adjourned at the date of said compromise agreement, and for about one week thereafter; and said agreement was not carried into judgment because of said temporary adjournment, and because, after reconvening of said Court, plaintiff had no attorney until after it abandoned said contract. Plaintiff afterwards refused to carry out said agreement, and seeks to recover the full amount of said $15,000 note, having tendered said bank stock into Court for defendants Curtis and Thomas upon the payment of said note. Sixty cents on the dollar of said bank stock is in the aggregate $10,800. On the 8th of August,

1893, when said bank stock was sold, the State National Bank of Vernon was in the hands of the United States Comptroller, having suspended business and closed its doors for want of funds to pay depositors, and at said date said bank stock had no value in the City of New York or in Vernon, Tex.

"On the issues between the plaintiff, the Southern National Bank, and H. C. Thomson, I find the following facts, viz.: On the 1st day of August, 1893, plaintiff employed the said H. C. Thomson, an attorney residing in Vernon, to institute and prosecute this suit against W. G. Curtis and A. U. Thomas, for the recovery of such balance as might remain unsatisfied after applying the proceeds from sale of the $18,000 bank stock, which sale it was understood should be made before the filing of said suit. The fee to be paid by plaintiff was agreed on at the time of said employment, viz.: $100 cash and 10 per cent. on such sum as he should finally collect on said claim, exclusive of the amount which should be realized from the sale of said bank stock by plaintiff in New York. Thompson knew at the time of his employment that Curtis and Thomas would have the right to reconvene in said suit for any damages, real or imaginary, arising from the sale of said bank stock, and in fact, when Thompson accepted said employment, he anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock. After the defendants Curtis and Thomas filed in said cause their plea in reconvention for damages, Thompson demanded an additional fee of plaintiff, which plaintiff declined to pay. Thompson threatened to abandon the case if an additional fee was not paid, and did actually quit the case the 10th day of August, 1894, which was the next day after the agreement of compromise between plaintiff and defendants Curtis and Thomas. The compromise

agreement above mentioned was effected through negotiations directly between plaintiff bank and Curtis and Thomas, and the attorney, Thompson, had no knowledge of such negotiations or agreement until after his abandonment of plaintiff's case. Before Thompson quit plaintiff's case, he prepared the necessary pleadings controverting and replying to said plea in reconvention, and prepared several sets of interrogatories, and caused depositions to be taken relative to said plea. The services rendered by Thompson for plaintiff prior to his withdrawal from the case, and before the compromise thereof, were reasonably worth $1,000, none of which has ever been paid."

R. P. Elliott and J. A. Lucky, for appellant.

Stephens & Huff, Basham & Hall, and H. C. Thompson, for appellees.

STEPHENS, *J.*: This suit was originally instituted in the summer of 1893 by appellant, a national bank, doing business in New York City, against A. U. Thomas and W. G. Curtis, of Vernon, Tex., on the promissory note of the latter in the sum of $15,000. The execution and delivery of this note to appellant was attended with a collateral delivery of 180 shares of the capital stock of the State National Bank of Vernon, then valued at $18,000, belonging to Thomas and Curtis. In accordance with the terms of the contract pledging this stock, appellant caused the same to be publicly sold on the stock market in New York, and became the purchaser thereof for $20, just prior to the bringing of the suit. Appellee H. C. Thompson, an attorney of the Vernon Bar, instituted the suit for appellant under a contract of employment which definitely fixed his compensation at $100 retainer, then paid, and 10 per cent. of what he might collect from

Thomas and Curtis. In February, 1894, a plea in reconvention was filed by Thomas and Curtis, alleging a conversion of their bank stock by appellant. Thereupon appellee Thompson began to demand an additional fee, and, upon appellant's refusal to accede to this demand, endeavored to extort it from appellant, notwithstanding the fact, as found by the trial court, that, when he accepted the employment, he "anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock." After appellant had refused to honor one or more unauthorized drafts drawn on it by appellee Thompson, it received the following letter from him:

"Vernon, Texas, June 27, 1894. The Southern National Bank, New York. Gentlemen: In view of the fact that you have failed and refused to pay me for services in the defense of the cross action for damages in the case of your bank *vs.* Thomas and Curtis, I have concluded to appear in this case no further; and all papers, correspondence, and the note now in my possession will be turned over to any duly-appointed attorney representing you, on payment for my services rendered thus far in defending and preparing the defense to the cross action for damages up to this time. Yours, respectfully, H. C. THOMPSON."

In a letter dated July 9, 1894, he made two propositions to appellant for his further continuance in the case upon the acceptance of either, but stating: "Otherwise I have made up my mind, finally, to withdraw." Both propositions were rejected.

The declaration quoted above was followed by conduct that was wholly irreconcilable with the confidential relation of attorney and client, as will appear from the following letters:

"Vernon, Texas, August 10, 1894. The South-

ern National Bank, New York City. Gentlemen: I telegraphed you on the 8th inst as follows: 'I will sell Curtis and Thomas note in Vernon, at public auction, for my fee, Saturday, August 18, 1894,' which I now confirm. I have also notified Thomas and Curtis of said sale. Respectfully, H. C. THOMPSON."

"Vernon, Texas, August 20, 1894. Southern National Bank N. Y.—Gentlemen: Your case is set for next week. No attorney looking after same. State National Bank busted on August 18, and will no doubt go into the hands of a receiver. The Curtis & Thomas note was sold last Saturday, 18th August, by me, and bought in by me for twenty-five dollars. On payment of my services up to date, am willing to turn you back note; otherwise, I shall proceed to sue on same in my own name. Respectfully, H. C. THOMPSON."

Thereupon appellant made Thompson a party defendant, and obtained an order of court requiring him to surrender the note declared on. Thompson reconvened for the value of his services as attorney in the case, and, strange to say, recovered $1,000, notwithstanding the Court held, and properly so, that he had, without cause, refused to comply with his contract of employment, and abandoned his client's case. This recovery was had below, and is sought to be sustained here, upon the ground that Thompson did not abandon the case till August 10, 1894, the date of a letter from him stating, "You can now come here, and look after your own interests, if you desire, in person;" and that appellant had the day before, without the knowledge of Thompson, entered into an agreement with Thomas and Curtis for a compromise of the suit, thereby preventing Thompson from doing what he had already in the most emphatic manner declared, both by word and deed,

he would not do. The bare statement of such a proposition ought to be sufficient to overturn it. The equitable principle which allows reasonable compensation for services already rendered, where the act of the client, without fault of the attorney, prevents the latter from earning his fee under the contract, cannot be applied to a case where the attorney is in fault from beginning to end, without a manifest perversion of that principle. Indeed, in this case it seems reasonably clear that the persistence of the attorney in the effort to extort a fee to which he was not entitled from a non-resident client was not without its influence in inducing such client to accept the proposition of compromise. It is, however, due said attorney to state that he appears to have acted upon a mistaken view of the scope and obligation of his contract; but against such mistake of law the Courts do not relieve.

But did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief. August 7, 1894, one M. J. Tompkins, of Vernon, wired appellant: "Thomas says will confess judgment if you will allow sixty cents for stock,"—to which appellant replied by letter and telegram on August 9, 1894, among other things, requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement, and, through other counsel employed about that time, sought to avoid it. When the agreement was made, the Court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial, the Court held appellant to the agreement, and, upon the offer of Thomas and Curtis to comply with its

terms, rendered judgment accordingly, deducting $10,800 from the sum due on the note, and giving judgment for the rest. It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We, then, have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it had been in any respect performed or acted on by the debtor. Upon the sole ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount due is denied.

We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and pre-existing status. For a succinct statement of the principle involved, see the quotation from Chitty on Contracts made by Justice Gaines in Railway Co. *vs.* Harriett, 80 Tex. 73, 15 S. W. 556, where its application, also, is illustrated. See, also, the opinion of Chief Justice Tarlton in Jennings *vs.* City of Ft. Worth, 7 Tex. Civ. App. 329, 26 S. W. 927. For this additional

reason, the judgment in favor of Thompson, as well as that allowing Thomas and Curtis the $10,800 credit, cannot stand. We, therefore, adopt the trial Court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank stock to them as tendered, and in its favor, against Thompson, upon his intervention, adjudging the costs accordingly.

The plaintiff then offered in evidence the following certificate :

> *Mr. Hornblower :* I think so much of the certificate as states that Curtis and Thomas never acquiesced in the tender should go out.
>
> *The Court :* That correction may be made.

Subject to that correction the certificate was admitted and is as follows :—

THE STATE OF TEXAS, }
County of Wilbarger. }

I, W. B. TOWNSEND, Clerk of the District Court of Wilbarger County, Texas, do hereby certify that, in the case of the Southern National Bank of New York *vs.* W. G. Curtiss and A. U. Thomas, No. 688 on the docket of the District Court of Wilbarger County, the plaintiff, on the trial of said cause, tendered into Court and to the said defendants the certificates of stock issued by the State National Bank of Vernon to W. G. Curtiss, numbered 97 and 98 respectively, the first being for one hundred and fifty shares of the capital stock of said bank, and the other for thirty shares of the capital stock of said bank, which certificates of stock were filed by the Clerk of said Court on the 8th day of August, 1895, and have ever since remained on file in said cause in said Court and are on file at this

time; that they have never been taken away by said Curtiss and Thomas or either of them, and that Curtiss and Thomas nor any one acting for them or either of them have not taken said stock away; * * * and that said stock now remains on file in said District Court of said Wilbarger County, Texas, * * * as appears of record in said cause.

Given under my hand and official signature
[SEAL.] and seal of office on this the 7th day of October, 1898.

W. B. TOWNSEND,
Clerk of the District Court
of Wilbarger Co., Texas.

The plaintiff then rested his case.

Mr. Hornblower: I hand your honor a certified copy of the decree as made by the Court of Civil Appeals.

IN THE COURT OF CIVIL APPEALS.

FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH.

SOUTHERN NATL. BK. OF N. Y.	From Dist. Court, Wilbarger Co., June 27, 1896.
2411 *vs.*	
W. G. CURTIS *et al.*	Opinion by Mr. Stephens, *A. J.*

This cause came on to be heard on a transcript of the record, and the same being inspected, be-

cause it is the opinion of this Court that there was error in the judgment, it is therefore considered, and so ordered, adjudged and decreed, that the judgment of the Court below be reversed, and this Court proceeded to render such judgment as should have been rendered by the Court below. It is the order of this Court that the appellant, the Southern National Bank of New York, do have and recover of and from the appellees, W. G. Curtiss and A. U. Thomas, the sum of fifteen thousand dollars, with six per cent. interest thereon from the 20th day of January, 1893, together with all their costs in this behalf expended. And it further appearing to the Court that the said W. G. Curtis and A. U. Thomas delivered to the appellant, the Southern National Bank of New York, 180 shares of the capital stock of the State National Bank of Vernon as collateral security for the note sued hereon; it is therefore ordered that said 180 shares of capital stock be turned over to them upon payment of this judgment, as per the tender of the appellant, and that in default of such payment said stock be sold as under execution and the proceeds applied to the payment of this judgment. It is further ordered that said H. G. Thompson take nothing by his plea of intervention herein, and that the appellant, the Southern National Bank of New York, go hence without day, and it have and recover of and from said H. G. Thompson all costs occasioned by his plea of intervention, and that this decision be certified below for observance.

I, W. L. HUFF, Clerk of the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, hereby certify that the foregoing page contains a true and correct copy of the judgment entered by this Court in the cause of the Southern National Bank of New York *vs.* W. G.

Curtis *et al.*, on appeal from the District Court of Wilbarger County.

Witness my signature and the seal of said Court, at office in the City of Fort [SEAL.] Worth, this 18th day of April, 1898.

W. L. HUFF,
Clerk.

I, B. D. TARLTON, Chief Justice of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, hereby certify that the foregoing Clerk's certificate is in due form.

B. D. TARLTON,
Chief Justice.

The defendant then read in evidence the two following letters:

(Copy.)

FEB. 15th, 1894.

A. U. THOMAS, Esq.,
210½ Main Street,
Houston, Texas.

DEAR SIR:—

I beg to acknowledge the receipt of your letter of Feb. 8th, and to inform you that a copy of it will be forwarded to our counsel, Mr. H. C. Thompson, with the request that he will make known to us the proposition submitted to him by you. You can rest assured that when this is received it will have our closest attention.

We never had any disposition to oppress you. All that we wanted and now want is the money owed us by Mr. Curtiss and yourself. When that is paid under the terms of your note the collaterals will be surrendered by us. We manifested in every proper way a disposition to help you, and it was

only when you failed to meet us that we were forced to resort to legal measures. If you will furnish a purchaser for the stock at seventy five or eighty cents on the dollar, the price suggested by you in a former letter, and will carry out the rest of your proposition, I should be willing to recommend to our Board to accept it. The litigation must necessarily be tedious, and loss must certainly come to both of us by reason of counsel fees, costs, etc.

I shall be glad to hear further from you.

Respectfully yours,

(Signed) J. D. ABRAHAMS,
Cashier.

THE SOUTHERN NATIONAL BANK
OF NEW YORK.

ISAAC ROSENWALD, President.
WALTER S. JOHNSTON, Vice-President.
J. D. ABRAHAMS, Cashier.
JOHN H. CARR, Asst. Cashier.

NEW YORK, Sept. 27th, 1894.

R. P. ELLIOT, Esq.,
Attorney at Law,
Vernon, Texas.

DEAR SIR:

I have seen our counsel and shown him your letter of the 14th. He agrees that we ought to have a copy of the amended answer setting up an alleged compromise. As soon as that comes I will show it to him and get his opinion then.

At present I may say in reply to your question "What do you want with the stock?" that we do not want the stock, and never have wanted it. We attempted to sell the stock here after default of payment of the note, as the terms of the note permitted us to do, but we virtually bid in the stock

ourselves and retained possession of it. We informed our former attorney at Vernon, and tried to impress it upon him, that we did not wish the stock and would give the debtors every benefit from it, notwithstanding the attempted sale. If we could have held the stock against the debtors, we would not have done so, and we testified to that effect in the depositions now on file in your courts. If the sale was not valid we still held the stock under the original terms of the note, and we were from the beginning perfectly willing for our former attorney at Vernon to take that course in the courts. If the stock turned out to be worth anything, we would get the benefit of it to the extent of our claim, and any balance would belong to the debtor.

The fact is, our counsel here thought the attempted sale did not amount to a sale, for the reason that no officer of the Bank was present with the Auctioneer, and that we simply hold the stock as collateral, as we did before the attempted sale. We were perfectly willing that the matter should so stand in the Court at Vernon. Our attorney there seemed desirous of having the stock sent on there to be foreclosed, notwithstanding the attempted sale here. We saw no use in that procedure, for if the sale here was not a sale, we had full power, under the terms of the note to make such a sale here as would be absolutely valid. We got our counsel here to prepare a brief on the subject, a copy of which was sent to our former attorney at Vernon. We have since sent a copy of it to you. You will see by the authorities there cited that we have ability to make a perfect sale of the property here without going to the expense of selling it under foreclosure proceedings in Texas. Moreover, our counsel advises us that he sees no use in making any sale of the stock at all. We

are in just as good position in holding the stock as collateral, as we would be by holding it by legal title. Upon reflection you will doubtless agree with us and our counsel here. We have not considered that we hold the stock under the alleged compromise, for no compromise was perfected.

We would like to have you tell us what you think of that defense when you send us the amended answer containing it. We will then get our counsel here to give us his opinion.

We knew nothing of the fact stated by you that Tompkins stood in with Thomas all the time. Do you think there was a conspiracy between Thomas and Tompkins to effect a compromise with us?

As to whether the stock will be assessed, will depend upon the action taken by the Comptroller of the Currency. If the Bank resumes, perhaps he will permit it to do so by reduction of capital without assessment. Nobody can form any opinion as to the probability of an assessment, until it is known what action the Comptroller will take, and whether the directors of the bank will be able to meet his terms.

Very truly yours,
(Signed) J. D. ABRAHAMS,
Cashier.

The defendant then called as a witness JESSE D. ABRAHAMS, who testified:

By Mr. Hornblower:

Q. You reside in this city? A. I do.

Q. What is your present business? A. I am the president now of the Marble Hill Quarry Company.

Q. A chartered concern? A. Chartered under the laws of New Jersey; the quarries are in Georgia.

Q. You no longer have any connection of any

kind with the Southern National Bank? A. I have not.

Q. And have not had since 1895? A. Not since March, 1895.

Q. In the years 1893 and 1894 and up to March, 1895, were you the cashier of the Southern National Bank? A. I was.

Q. And were you as cashier familiar with the transactions connected with the loan to Curtis and Thomas upon the stock of the Vernon National Bank of Texas? A. I was.

Q. That stock was put up and sold at auction in August, 1893? A. I think so. I know it was put up and sold at auction; the exact date I don't recall; I think it was August.

Q. And bid in by the Bank for the nominal sum of $20? A. Yes, sir.

Q. It was never transferred on the books of the Vernon Bank? A. Not during the time I was cashier.

Mr. Hornblower: It is averred by the complaint that it never was at any time.

Q. At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the Bank to take title adversely to the pledgors?

Objected to by Mr. Paige.

Question allowed. Exception.

Mr. Paige: The objection is that it calls for conclusions and for facts not within his knowledge.

A. No.

Q. What was the purpose of the sale? A. To make it the introduction to the suit for the amount of money which was due us.

Q I show you your letter-book. That is the letter-book of your Bank while you were cashier in February, 1893? A. Yes, sir.

Q. I show you what purports to be a copy of a letter signed by you, dated February 15, 1894, addressed to A. U. Thomas. He was one of the signers of the note, was he? A. I wrote that letter.

Q. And sent it to Mr. Thomas? A. I did.

The letter referred to is the one of that date already offered in evidence.

Q. Did Mr. B. F. Elliott represent the Southern National Bank as attorney in this matter in 1894? A. He did, sir; if I recollect, the name was R. P.

Q. Did you write a letter of instructions to him with regard to the position to be taken as to this stock? A. I wrote him several letters.

Q. I show you this letter purporting to be signed by you, dated September 27, 1894, and ask you if you signed that letter and if you sent it to Mr. Elliott? A. That is my signature; it was sent to him.

The letter is the one of that date already offered in evidence.

Q. Did your bank ever receive any dividend upon that stock? A. Never.

Q. Did your bank ever vote upon that stock? A. Never.

Cross-examination by Mr. Paige:

Q. The Vernon National Bank suspended temporarily during the Fall of 1893? A. The Vernon Bank suspended.

Q. During the Fall of 1893? A. I don't remember the date; 1893 or 1894.

Q. The bank finally failed and a receiver was appointed in August, 1894, but before that and in the Fall of 1893 the bank temporarily stopped, didn't it, and was afterwards reorganized by other parties? A. It was in the hands of the Bank Examiner.

Q. For a while? A. Yes.

Q. And was afterwards reorganized by other parties? A. I think so.

Q. Will you say that was in the Fall of 1893? A. I think it was 1893; I am not positive.

Q. Was your deposition taken as a witness in the Texas suit? A. Yes, sir; two of them, I think.

Q. Did you give this testimony in that suit upon that deposition: "The Southern National Bank of New York now has the stock so sold in its possession; said bank became the owner of said stock by purchase at said sale made by Messrs. R. V. Harnett & Co. on August 8th, 1893; Mr. F. B. T. purchased for the Southern National Bank of New York the stock so sold"? A. Yes, sir; that is my recollection.

Re-direct examination by Mr. Hornblower:

Q. Did you also testify in that deposition as follows: "In answer to the eighth cross-interrogatory propounded to him he says: Our real object in selling the stock at public auction after due notice of sale, both by publication here and due notice to the owners of the stock was to obtain for it the best possible price, and if necessary to purchase it ourselves, as we had a perfect right to do under the agreement contained in the note; the stock is to-day in our possession and we will surrender it to the owners upon receipt of amount due us, which amount is fixed by the terms of the note"? A. Yes, sir.

DEFENDANT RESTS.

The plaintiff then asked the Court to direct a verdict for the plaintiff, which the Court refused to do, and plaintiff excepted.

The Court directed a verdict for the defendant and plaintiff excepted.

The plaintiff then asked to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint, which the Court refused, and plaintiff excepted.

The plaintiff then asked to go to the jury on the issues in the action, which the Court refused, and plaintiff excepted.

In obedience to such direction of the Court the jury then rendered a verdict for the defendant and plaintiff excepted.

The foregoing bill of exceptions contains all the evidence.

The plaintiff by his counsel prays that this his bill of exceptions may be signed and sealed and it is signed and sealed accordingly.

Dec. 16, 1898.

E. HENRY LACOMBE,
U. S. Circuit Judge.

U. S. CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas,

against

THE SOUTHERN NATIONAL BANK.

At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for writ of error, avers:

That in the record and proceedings in this action, and also in the matters recited and contained in the bill of exceptions and also in the giving of the verdict and judgment aforesaid, there is manifest error, in that the Judge presiding at said Circuit, against the objection of the plaintiff, made the following rulings, each of which was erroneous and to the injury of the plaintiff, to wit:

I.—In permitting the witness Abrams to answer the following questions: "At the time of the sale of that collateral security, and at the time of the nominal purchase for $20, was it the intention of the officers of the bank to take title adversely to the pledgors?"

II.—In refusing to direct a verdict for the plaintiff.

III.—In refusing to permit the plaintiff to go to the jury upon the issue as to whether the defendant was the real owner of the stock described in the complaint herein.

IV.—In refusing to permit the plaintiff to go to the jury upon the issues in the action.

V.—In directing the jury to render a verdict for the defendant.

VI.—In that the jury, in obedience to the direction of the Court, rendered a verdict for the defendant.

Wherefore the plaintiff prays that the judgment aforesaid may be reversed.

EDWARD WINSLOW PAIGE,
Attorney for Plaintiff, being
Plaintiff in Error,

44 Cedar Street, N. Y. City.

(Endorsed): "U. S. Circuit Court, So. Dist. of N. Y.—F. Windsor Robinson, as Receiver, &c., plaintiff, against The Southern National Bank, defendant.—Assignment of Errors.—Edward Winslow Paige, attorney for Plff.-Appellant, 44 Cedar Street, New York City."

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES

FOR THE SECOND CIRCUIT.

F. WINDSOR ROBINSON, as Receiver of the concerns of the State National Bank of Vernon, Texas, Appellant.

against

THE SOUTHERN NATIONAL BANK, Respondent.

To the Southern National Bank of New York. GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, for the Second Circuit, to be holden at the City of New York in said Circuit, on the 27th day of February next, pursuant to an appeal allowed herein and filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein F. Windsor Robinson, as Receiver, etc., is appellant and you are respondent, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Given under my hand at the City of New York, in the above-named district, this 31st day of January, in the year of our

Lord one thousand eight hundred and ninety-nine.

E. HENRY LACOMBE,
Circuit Judge.

[Endorsed]: "U. S. Circuit Court of Appeals, 2d Circuit—F. Windsor Robinson, as Rec'r, Plaintiff in Error, against The Southern National Bank, Defendant—Citation—Edward Winslow Paige, Attorney for Plff. in Error, 44 Cedar Street, New York City."

Sufficient service of the foregoing writ of error and citation is hereby admitted this 6th day of February, 1899.

HORNBLOWER, BYRNE, TAYLOR & MILLER,
Solicitors for Defendant Bank.

[Endorsed]: U. S. Circuit Court.
Filed Feb. 6, 1889.

JOHN A. SHIELDS,
Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, JOHN A. SHIELDS, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify that the preceding pages, numbered from 2 to 93 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of F. Windsor Robinson, plaintiff in error, against The Southern National Bank of New York, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 6th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

JOHN A. SHIELDS,
Clerk.

95 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Submitted April 28, 1899; decided May 25, 1899.

F. Windsor Robinson, as Receiver, etc., Plaintiff in Error,
vs.
The Southern National Bank of New York, Defendant in Error. } No. 148.

In error to the circuit court of the United States for the southern district of New York. Before Judges Wallace, Shipman, and Thomas.

Wallace, *Circuit Judge:*

This is a writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon a verdict by the direction of the court. The plaintiff was the receiver of the State National Bank of Vernon, Texas, which became insolvent in August, 1894, and brought this action to recover an assessment upon the stockholders of the bank made by the Comptroller of the Currency. The action was brought upon the theory that the defendant was a shareholder, and liable for the assessment, pursuant to the provisions of section 5151 of the Revised Statutes of the United States. It appeared upon the trial that in January, 1893, one Curtis was the owner of 180 shares of the capital stock of the bank, which stood in his name on the books of the bank, and for which he held the usual certificates; that on that day he pledged the shares with the defendant as collateral security for the payment of certain liabili-
96 ties, including a note for $15,000 payable four months after date; that by the terms of the pledge the defendant was authorized, upon non-payment of the note at maturity, to sell the shares at any time, without advertisement or notice to the pledgor, and to become the purchaser at the sale discharged from any equity of redemption by the pledgor; that the note was not paid at maturity, and in August, 1893, the defendant advertised the stock to be sold at auction at the public exchange in New York city, and gave eight days' notice by telegraph to the pledgor; that at the sale thus advertised the defendant bought the stock, paying for it $20 to the auctioneer, and thereupon credited the proceeds of the sale upon the note by an indorsement thereon; and that the certificates for the stock remained in the possession of the defendant from the time of the purchase until after the making of the assessment by the Comptroller of the Currency, but the stock was never transferred to the defendant upon the books of the bank.

The facts certainly would have justified a finding by the jury that the relation of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner when the bank failed. The only ground

upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank, and remained in the name of the original owner, the defendant was not a shareholder within the meaning of section 5151. By section 5139 of the Revised Statutes the capital stock of national banks is made "transferable on the books of the association, in such manner as may be prescribed by the by-laws or articles of association." The section then declares: "Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." It is the generally accepted doctrine of the courts that, notwithstanding a provision of this kind in the organic law of a corporation, the legal title to its shares
97 of stock passes as between vendor and vendee upon a transfer of the certificates accompanied by a power of attorney for their transfer upon the books, without an actual transfer upon the books. Until registration, however, the purchaser does not acquire the privileges of a stockholder of the corporation; he can compel the corporation to recognize him as a stockholder, but until he has been registered as such he has no right to vote, and dividends are payable to the stockholder of record. Is such a purchaser a shareholder within the meaning of section 5151 of the Revised Statutes, which declares that "shareholders of every national banking association" shall be individually responsible to the extent of the amount of their stock for the debts of their association? It is somewhat remarkable that in all the litigations which have been presented to the Supreme Court, involving the liability of shareholders of national banks upon assessments made by the Comptroller of the Currency, the question which is thus presented has never been distinctly decided.

In Pauly *v.* State Loan and Trust Co. (165 U. S., 619), the court had before it a case in which a pledgee who had received from his debtor a transfer of shares as collateral security for a debt, surrendered the certificate to the bank and took out new ones in which he was described as pledgor, but never was registered otherwise upon the books of the bank. In deciding as the court did, that the pledgor was not liable to an assessment as a stockholder, the cases previously adjudged by the court were elaborately reviewed, and in the opinion several rules were stated as deducible therefrom; and among them was the following: "That the real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder within the meaning of section 5151." On the other hand in Richmond *v.* Irons (121 U. S., 58), in considering the question of the liability of the stockholders to an assessment under the section the court used this language:

"By section 5139 of the Revised Statutes those persons only
98 have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the

stockholder for all the purposes of the law." The proposition which has been quoted from the Pauly case was not necessary to the decision of the cause; nor was the proposition quoted from Richmond *vs.* Irons necessary to the decision of that cause. An examination of the cases cited by the Supreme Court fails to disclose one in which the owner of the shares has been held liable under the section who had never been the owner upon the books of the bank; and the cases in which the "real owner" has been held liable were those in which, being the registered owner, he has transferred his shares to another for the purpose of escaping the liability of a stockholder, or caused them to be registered in the name of an irresponsible transferee. Such was the case in National Bank *v.* Case (99 U. S., 628), where the registered owner caused the stock to be transferred to one of its clerks, who acquired no beneficial interest in it, and upon the understanding that he would transfer it at request. In Bowden *v.* Johnson (107 U. S., 251), the registered shareholder, in apprehension of the bank's failure, had transferred his stock to an irresponsible person.

It is well settled that one to whom stock has been pledged as collateral security and who has caused it to be registered upon the books of the bank in his name as owner is liable as a stockholder for the benefit of creditors, as though he were the real owner. The courts have placed his liability upon three grounds—that he is estopped from denying his liability because he has voluntarily held himself out to the public as the owner of the stock; that by taking the legal title he has released the former owner from liability; and that after having taken the apparent ownership, and become entitled to the privileges of a stockholder, it would be unreasonable to release him from the responsibilities of a stockholder. None of
99 these reasons apply in the case of one who, like the defendant, has never been a stockholder upon the books of the bank, has never held himself out as such a stockholder, has not defeated the liability as a stockholder of the pledgee, and has not enjoyed the privileges of a stockholder.

In National Park Bank of New York *v.* Harmon, the defendant became pledgee of forty shares of stock of the par value of $100 each in a national bank as collateral security for a demand loan made in November, 1891. In July, 1892, the loan not having been paid, the pledgee procured a transfer of the shares on the books of the bank to one of its employees who was irresponsible and had no interest in the transaction, in order that the latter should remain the registered owner of the shares. The bank failed in April, 1894, the shares at the time standing in the name of the pledgee's employé. This court held upon the authority of the Pauly case that the pledgee was not liable as a shareholder of the bank. Obviously he was the substantial owner of the shares, though technically the relation of pledgor and pledgee had not been terminated. The amount of the loan was nearly double the value of the shares, and the time which had elapsed denoted that the pledgor would never seek to redeem. The pledgee, by causing the transfer to be made upon the books of the bank, had discharged the liability of the pledgor

as a stockholder to the creditors of the bank. If there was no moral duty on the part of the pledgee in that case to subject himself to liability as a shareholder, there was not on the part of the defendant in the present case; and if no legal liability was incurred by the pledgee in that case, there is no reason why any should attach to the defendant in this case unless it is found in the letter of the statute. Our decision in that case was affirmed by the Supreme Court (172 U. S., 644).

The question presented is an interesting one, and we should certify it to the Supreme Court if there were any necessity for adopting that course. But as our decision is reviewable by that court, and will be reviewed, however we may dispose of the case, it seems
100 proper to decide the cause according to our convictions, and without attempting an elaborate discussion of the question. Our conclusion is that the defendant, never having been a registered shareholder of the bank, is not liable to the assessment.

The judgment is accordingly affirmed.

Edward W. Paige, for the plaintiff in error.

William B. Hornblower, for the defendant in error.

101 At a stated term of the United States circuit court of appeals in and for the second circuit held at the court-rooms, in the post-office building, in the city of New York, on the 6th day of June, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, circuit judges; Hon. E. B. Thomas, district judge.

F. Windsor Robinson, as Receiver, etc., Plaintiff in Error,
v.
Southern National Bank of New York, Defendant in Error.

Error to the circuit court of the United States for the southern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the southern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed with costs.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.

[Endorsed:] United States circuit court of appeals, second circuit. F. Windsor Robinson, as receiver, *vs.* Southern National Bank. Order for mandate. United States circuit court of appeals, second circuit. Filed June 8, 1899. Wm. Parkin, clerk.

102 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 101, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of F. Windsor Robinson, as receiver, against Southern National Bank of N. Y., as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of July, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled 7, 17, '99. W. P.]

103 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the United States circuit court of appeals, before you or some of you, between F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff in error, and The Southern National Bank, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you that, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28 day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

—— ——.

104 Allowed, and the writ being applied for by the direction of the Comptroller of the Currency of the United States, to operate as a supersedeas without bond.

Dated June 28, 1899.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

105 [Endorsed:] U. S. Supreme Court. F. Windsor Robinson, as receiver, etc., plaintiff in error, against The Southern National Bank, defendant. Writ of error. Edward Winslow Paige, attorney for pl'ff in error, 44 Cedar street, New York city. United States circuit court of appeals, second circuit. Filed Jul- 13, 1899. Wm. Parkin, clerk.

106 The President of the United States to the Southern National Bank of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 28th day of June, 1899.

—— ——.

107 [Endorsed:] U. S. Supreme Court. F. Windsor Robinson, as receiver, etc., plaintiff in error, against The Southern National Bank, defendant. Citation. Edward Winslow Paige, attorney for pl'ff in error, 44 Cedar street, New York city. Sufficient service of a copy of the within citation on the defendant, So. Nat'l Bank, is hereby admitted. Dated N. Y., June 28th, 1899. Wm. B. Hornblower, counsel for said defendant. United States circuit court of appeals, second circuit. Filed Jul- 13, 1899. Wm. Parkin, clerk.

Endorsed on cover: File No., 17,520. U. S. circuit court of appeals, 2d circuit. Term No., 406. F. Windsor Robinson, as receiver of the concerns of the State National Bank of Vernon, Texas, plaintiff in error, *vs.* The Southern National Bank of New York. Filed September 28th, 1899.